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SUPREME COURT OF THE UNITED STATES.

No. ~~165.~~ 91.

ELIAS L. BEARD ET AL., PLAINTIFFS IN ERROR,

vs.

JULIAN FEDERY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 165.

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1 UNITED STATES OF AMERICA,
Northern District of California:

Pleas before the judges of the circuit court of the United States in and for the northern district of California, at the court-house in the city of San Francisco, at the regular June term, 1863.

Northern district of California.

Be it remembered that at the regular June term, 1863, before the Hon. Stephen J. Field, associate justice of the United States Supreme Court, and the Hon. Ogden Hoffman, United States district judge, at the court-house in the city of San Francisco, came Julian Fedory, by his counsel, Eugene Casserly, esq., and brought into court, before the aforesaid judges thereof, his certain complaint or declaration against Elias L. Beard and others, defendants, of a plea of trespass and ejectment, which said complaint was filed on the 1st day of March, A. D. 1860, and follows in these words, that is to say:

2 *Complaint.*

Circuit court of the United States for the districts of California.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THREFALL, JOHN DOE, RICHARD ROE, JOHN NOAKES, RICHARD NOAKES.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Julian Fedory, the plaintiff in this action, who is an alien and a subject of the Emperor of France, residing in the county of Alameda, in said district, complains of Elias L. Beard, Henry G. Ellsworth, Ashely Cameron, Michael Gannon, Augustus E. Johnson, James Threfall, and also John Doe, Richard Roe, John Noakes, and Richard Noakes, the true names of which four last named are unknown to the said plaintiff, defendants in this action, all of whom
3 are citizens of the State of California and of the United States, and residents of said county of Alameda, and shows:

That on the 29th day of February, 1860, he, the plaintiff, was possessed of the following described premises within the said county of Alameda, in said northern district: all that certain tract, piece, or parcel of land situated, lying, and being at the mission of San José, in the county of Alameda, State of California, being the tract including the mission church of the mission of San Joe, the cemetery which adjoins the church, and the garden of the said mission which adjoins the said church, and being designated upon the plats of the public surveys of the United States as lot number thirty-seven, in township four south, of range one west, and lot number thirty-seven of township five south, of range one west, Mount Diablo meridian, and more particularly bounded and described as follows:

Commencing at an angle of the adobe wall enclosing the said garden and orchard at the southeast corner of the tract; thence by the true meridian, (the variation of the magnetic needle being fifteen degrees forty-seven minutes east.) south eighty degrees west, along the course of said wall, eight chains and seventy-nine links to the southwest corner of said wall, station; thence
4 south eighty-three degrees fifteen minutes west, at two chains and sixteen links across an open space, and to corner of wooden fence,

and with the fence at six chains, the corner of an adobe house on front line of trees, six chains and forty links to stake, station; thence north twelve degrees thirty minutes west, along front line of said tract, and in front of the church and corridor, eleven chains and forty-six links to a stake, station; thence north seventy-six degrees fifteen minutes east, at one chain and seventy links, opposite the corner of a board fence on the right, at three chains and ninety links, the northwest corner of the adobe wall, including the garden and orchard, and with said wall sixteen chains and eleven links to northeast corner of wall and tract, station; thence south nine degrees east, along the adobe wall, at three chains and eighty-five links, intersects the township line eight chains and ninety links west of the corner to townships four and five south on the Mount Diablo meridian line, twelve chains and ninety links to the place of beginning—containing nineteen acres and nineteen hundredths of an acre; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in an ywise appertaining.

5 Also, a certain other piece of land having two springs of water thereon, lying outside of the said adobe wall of the said orchard, to the north or northeast of the said northeast angle of the said wall and the said two springs.

Also, a certain other piece of land having a mill-dam and a pond or reservoir of water thereon, lying to the north or northeast, or thereabouts, of the northeast angle of the said adobe wall, and the said mill-dam, pond, or reservoir, together with the mill-race or canal supplied therefrom, and the land over and through which the same passes, and the flouring mill at the end of said mill-race or canal, together with the land on which the same stands.

That being so possessed, the defendants afterwards, on the first day of March, 1860, unlawfully entered into the said premises and ousted the plaintiff therefrom, and unlawfully withhold from him the possession thereof, to his damage one thousand dollars.

That the yearly value of the rents and profits of the said premises is five thousand dollars.

Wherefore, he demands judgment against the defendants for the possession of said premises, and that the value of the rents and profits as aforesaid

6 with his damages and costs.

EUGENE CASSERLY, *Att'y for Pl'ff.*

SAN FRANCISCO, *March* 1, 1860.

Endorsed: Filed March 1st, 1860.

CUTLER McALLISTER, *Clerk.*

7 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States for the districts of California in and for the northern district.

JULIAN FEDERY, plaintiff,
vs.
ELIAS L. BEARD *et als.*, defendants.

Action brought in the said circuit court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States of America, greeting, to Elias L. Beard, Henry G. Ellsworth, Ashley Cameron, Michael Gannon, Augustus E. Johnson, James Threfall, John Doe, Richard Roe, John Noakes, Richard Noakes:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States for the districts

of California, and to file your plea, answer, or demurrer to the
8 complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court, in the city and county of San Francisco, within ten days (exclusive of Sundays and day of service) after the service on you of this summons, if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover possession of certain pieces or parcels of land situate in the county of Alameda, northern district of California, with rents and profits at the rate of five thousand dollars per year, damages and costs, all of which is more particularly set forth in the complaint; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

[SEAL.] Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States of America, this second day of March, in the year of our Lord one thousand eight hundred and sixty, and of our independence the eighty-fourth.

Attest: CUTLER McALLISTER, *Clerk.*

9 *Marshal's return.*

[Endorsed.]

OFFICE OF THE MARSHAL OF THE
NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I hereby certify that I received the within summons on the 2nd day of March, A. D. 1860, and personally served the same on the 2nd day of March, A. D. 1860, by delivering to Elias L. Beard, one of said defendants, in San Francisco, and on the 6th day of March, A. D. 1860, served Henry G. Ellsworth, Michael Gannon, Aug. E. Johnson, and James Threfall, and on the 7th day of March, 1860, served Ashley Cameron, said defendents, personally, in the county of Alameda, a copy of said summons attached to a certified copy of the complaint.

Dated at San Francisco this 7th day of March, A. D. 1860.

P. L. SOLOMON, *Marshal,*
By JOHN H. WILLIAMS,
Deputy Marshal.

Filed this 17th day of March, A. D. 1860.

CUTLER McALLISTER, *Clerk.*

10 *Demurrer of E. L. Beard.*

And afterwards, to wit, on the 8th day of March, A. D. 1860, comes the defendant, E. L. Beard, by his attorney, A. M. Crane, esq., and files his demurrer to said complaint, in words and figures following, to wit:

Circuit court of the United States for the districts of California.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THELFALL, JOHN DOE, RICHARD ROE, JOHN NOAKES, RICHARD NOAKES.

Comes now the said defendant, Elias L. Beard, who has been served with process herein, and says that the said complaint of the said plaintiff, and the matters therein stated in manner and form as the same are therein stated, is not sufficient in law to enable the said plaintiff to have and maintain his said action against this defendant.

And for cause of demurrer this defendant says: First. That said complaint does not state facts sufficient to constitute a cause of action.

11 It does not appear, nor is it shown nor alleged in and by said complaint, that the said plaintiff was ever at any time lawfully in possession of the lands and tenements described in said complaint.

It does not appear by said complaint that defendant, or any of the defendants, at any time, or on any day before the commencement of this suit entered upon said lands and ejected the plaintiff therefrom.

No ouster of plaintiff by defendants, or any of them, is shown by said complaint at any time, or on any day, before the commencement of this suit.

A. M. CRANE,
Attorney for said Defendant, Elias L. Beard.

[Endorsed.]

Service made personally by copy on Eugene Casserly, attorney for plaintiff, in the city of San Francisco, March 8, 1860.

P. L. SOLOMON, *U. S. Marshal,*
By JOHN H. WILLIAMS.

Filed March 8, 1860.

CUTLER McALLISTER, *Clerk.*

12 And afterwards, to wit, on the 17th day of April, A. D. 1860, comes the defendants, H. G. Ellsworth, M. Gannon, A. E. Johnson. James Threfall, and A. Cameron, by their attorney, A. M. Crane, esq., and file their demurrer to said complaint in words and figures following, to wit:

Demurrer of Henry G. Ellsworth and others.

In the circuit court of the United States for the districts of California, in and for the northern district.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THREFALL, JOHN DOE, RICHARD ROE, JOHN NOAKES, RICHARD NOAKES.

Come now said defendants, Henry G. Ellsworth, Michael Gannon, Augustus E. Johnson, James Threfall, and Ashley Cameron, and defend the wrong and injury, when, &c., and say that the said complaint and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against said defendants last named, and that they, the said last-named defendants, are not bound by the law of the land to answer the same; wherefore, for want of a sufficient complaint in this behalf, the said last-named

13 defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them.

And for causes of demurrer said defendants last named say that said complaint does not state facts sufficient to constitute a cause of action.

1. Because it does not appear, nor is it shown by said complaint, that the plaintiff was possessed of or had any title to the land sued for before said suit was commenced.

2. It is not alleged in said complaint that plaintiff was ever, or at any time, *lawfully* in possession of said land.

3. It is not shown by said complaint that defendants ever, at any time, *before this suit was commenced,* entered upon said land or ousted the plaintiff therefrom.

4. Said complaint shows that the trespass or ouster complained of was committed by defendants on the same day on which the suit was commenced, to wit, March 1st, 1860, but it fails to show that the same was committed before this suit was commenced.

14 5. The tract of land in said complaint described as follows: "Also a certain piece or parcel of land having two springs of water thereon, lying outside the said adobe wall of the said orchard, to the north or northeast of the said northeast angle of the said wall and the said two springs," is not described by metes and bounds.

6. It is not described with proper and convenient certainty, or with any certainty whatever.

7. And further, the tract of land described in said complaint as follows: "Also a certain other piece of land having a mill-dam and a pond or reservoir of water thereon, lying to the north or northeast, or thereabouts, of the northeast angle of the said adobe wall and the said mill-dam, pond, or reservoir, together with the mill-race or canal supplied therefrom, and the land on and through which the same passes, and the flouring mill at the end of said mill-race or canal, together with the land on which the same stands," is not described by metes and bounds.

8. The same is not described with proper and convenient certainty, or with any certainty whatever.

15 9. And for further cause of demurrer said defendants say that the said complaint unites in one and the same count three distinct causes of action, seeking therein to recover possession of three distinct, separate, and detached parcels of land.

10. And the said count further unites a claim for damages for the rents, profits, and detention of the land with a claim to recover the possession thereof; and in both of said respects defendants say said complaint is bad for duplicity.

A. M. CRANE,
Att'y for Defendants last above named, Alameda.

Endorsed: U. S. marshal's office, northern dis. of Cal'a.

I certify that I have this day made personal service by copy of the written demurrer on Eugene Casserly, attorney for plaintiff in this case, in the city of San Francisco.

P. L. SOLOMON, *U. S. Marshal,*
By JOHN H. WILLIAMS, *Deputy.*

Dated at San Francisco, April 17th, 1860.

Filed April 17, 1860.

CUTLER McALLISTER, *Clerk.*

Order overruling demurrer.

16 And afterwards, to wit, on the 19th day of November, A. D. 1861, the following was duly entered of record in said cause, to wit:

At an extra term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Tuesday, the 19th day of November, in the year of our Lord one thousand eight hundred and sixty-one.

Present: The honorable M. Hall McAllister, judge of said court.

JULIAN FEDERY
vs.
ELIAS L. BEARD *et al.* } At common law.

And now, at this day, the demurrers in the above-entitled cause having been heretofore duly argued and submitted to the court, it is ordered that the demur-

rers in the above-entitled action are hereby overruled, with leave to defendants to file their answers within ten days after receiving notice of the overruling of these demurrers.

Endorsed: Filed this 19th day of Nov., 1861.
CUTLER McALLISTER, *Clerk.*

17 And afterwards, to wit, on the 30th of November, A. D. 1861, comes the defendant, H. G Ellsworth, by his attorney, A. M. Crane, esq., and files his answer to said complaint, in the words and figures following, to wit:

Answer of H. G. Ellsworth.

In the circuit court of the United States for the districts of California, northern district.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THRELFALL, JOHN DOE, RICHARD ROE, JOHN NOAKES, RICHARD NOAKES.

I. Comes now the said defendant, Henry G. Ellsworth, and for answer to the complaint of said plaintiff says, that he is not guilty of the trespass and ejectment in the said complaint alleged against him.

And this defendant denies that on the 29th day of February, 1860, or at any other time, the said plaintiff was possessed of the land in the said complaint described.

And defendant further denies that on the 1st day of March, 1860, or at any other time, he, defendant, ever unlawfully entered into the said premises, or ousted the plaintiff therefrom, or that he now unlawfully holds or with-
18 holds from the plaintiff the possession thereof.

And defendant further denies that the yearly value of the rents and profits of said premises is five thousand dollars or any other sum.

And defendant denies specifically each and every allegation in said complaint contained.

II. And this defendant says that so much of the premises sought to be recovered in this action, which in said complaint are described as follows, viz:

"Also a certain other piece of land having a mill-dam, and a pond or reservoir thereon, lying to the north or northeast, or thereabouts, of the northeast angle of the said adobe wall, and the said mill-dam, pond, or reservoir, together with the mill-race or canal, supplied therefrom, and the land over and through which the same passes, and the flouring mill at the end of said mill-race or canal, together with the land on which the same stands;" and "also a certain other piece of land, having two springs of water thereon, lying outside the said adobe wall of the said orchard, to the northeast of the said northeast angle of said wall, and the said two springs," is, and are, and at and before the commencement of this action was, and were, the land estate and property in fee simple
19 of him, this defendant, and as such was, and were, and still are, occupied and possessed by defendant.

And as to the remainder and residue of the lands, tenements, and premises in said complaint described, defendant disclaims any title to or possession of the same.

III. And for further answer in this behalf, defendant says that neither the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of said land herein last before described within five years before the commencement of

this action; and further, that the said plaintiff has no claim to the said last-described premises under any title derived from the Spanish or Mexican governments, or the authorities thereof.

IV. And for further answer in this behalf, defendant says that he, defendant, and those under whom he claims, have been in possession of said last-described premises under a claim of title thereto, exclusive of any other right, and that such claim of title was, and is, founded upon a written conveyance of said premises, for more than five years next before the commencement of this action.

Defendant demands judgment against said plaintiff and his costs herein.

A. M. CRANE,
Attorney for said defendant, Henry G. Ellsworth.

Endorsed: Filed Nov. 30, 1861.

CUTLER McALLISTER, *Clerk.*

20 And afterwards, to wit, on the 30th of November, A. D. 1860, come the defendants, Ashley Cameron, M. Gannon, and A. Johnson, by their attorney, A. M. Crane, esq., and file their answer to said complaint, in words and figures following, to wit:

Answer of Ashley Cameron and others.

In the circuit court of the United States for the districts of California, northern district.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THRELFALL, JOHN DOE, RICHARD ROE, JOHN NOAKES, RICHARD NOAKES.

Come now the said defendants, Ashley Cameron, Michael Gannon, and Augustus Johnson, (sued by the name of Augustus E. Johnson,) and for answer to the complaint of said plaintiff say, and each for himself says, that they are not guilty of the trespass and ejectment in the said complaint alleged against them.

Defendants further deny that on the 29th day of February, 1860, or at
21 any other time the said plaintiff was possessed of the lands in said complaint described.

Defendants further deny that on the first day of March, 1860, or at any other time, defendants ever unlawfully entered into the said premises, or ousted the plaintiff therefrom, or that they unlawfully hold or withhold from plaintiff the possession thereof.

Defendants further deny that the yearly value of the rents and profits of said premises is five thousand dollars or any other sum.

Defendants deny specifically each and every allegation in said complaint contained.

A. M. CRANE,
Attorney for said defendants, Gannon, Johnson, and Threlfall.

Endorsed: Filed Nov. 30, 1861.

CUTLER McALLISTER, *Clerk.*

22 And afterwards, to wit, on the 30th day of November, A. D. 1861, comes the defendant, E. L. Beard, by his attorney, A. M. Crane, esq., and files his answer to said complaint, in words and figures following, to wit:

Answer of E. L. Beard.

In the circuit court of the United States for the districts of California, northern district.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THRELFALL, JOHN DOE, RICHARD ROE, JOHN NOAKES, RICHARD NOAKES.

Comes now the said defendant Elias L. Beard, and for an answer to the complaint of said plaintiff, says that he is not guilty of the trespass and ejectment in the said complaint alleged against him.

And this defendant denies that on the 29th day of February, 1860, or at any other time, he, defendant, ever unlawfully entered into the said premises, or ousted the plaintiff therefrom, or that he unlawfully holds or withholds from the plaintiff the possession thereof.

23 And defendant further denies that the yearly value of the rents and profits of said premises is five thousand dollars or any other sum.

And defendant denies specifically each and every allegation in said complaint contained.

II. And for further answer in this behalf, this defendant, Elias L. Beard, avers and says, that at the time of the commencement of this action, he, this defendant, was, and for a long time had been, and still is, the owner in fee simple absolute, by good and indefeasible title thereto, of all that part of the tract of land first described in said complaint by metes and bounds as containing nineteen $\frac{19}{100}$ acres, which is known as the orchard of the mission of San José, and which orchard embraces all of said nineteen $\frac{19}{100}$ acres, except only the mission church and a small enclosed yard on the northwest side of and adjacent to said church, and a row of adobe buildings adjacent to and on the southeast side of said church, the cemetery on the north side of the church, and the court or square enclosed by said church and adobe buildings, all of which buildings and premises hereby excepted are bounded as follows, viz: Commencing for a boundary thereof at the northwest corner of said cemetery, on the east line of the road or highway passing in front of said church, and thence running easterly along the

24 north fence of said cemetery 3 $\frac{15}{100}$ chains to the northeast corner of said cemetery; thence, at right angles thereto, southerly 6 $\frac{63}{100}$ chains, to the north wall or line of a lane; thence westerly along the north wall of said lane 3 $\frac{15}{100}$ chains to the east line of said road, and thence northerly along the said east line of said road 6 $\frac{55}{100}$ chains to the place of beginning—containing two acres, more or less, and to which premises, so last described, this defendant disclaims any ownership, right, title, or possession whatever; but the remainder of said premises, known as the orchard of the mission of San José, defendant has peacefully, and in his own right, and as his own property, occupied for more than ten years last past, as he might lawfully do, he, this defendant, and those under whom defendant claims, having had, during all that time, a good and indefeasible title in fee simple thereto.

III. And for further answer in this behalf this defendant says and avers that neither the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of said land, to wit, said orchard of the mission of San José, within five years before the commencement of this action, and further that said plaintiff has no claim to the said orchard under any title derived from the Spanish or

25 Mexican government, or the authorities thereof.

IV. And for further answer, this behalf defendant says that he, defendant, has been in possession of said orchard, under a claim of title thereto, exclusive of any other right, and that such claim was and is founded upon a written conveyance of said premises, for more than five years next before the commencement of this action, and has peaceably and adversely held said orchard, and fully possessed and occupied the same and every part thereof, adversely as aforesaid, under said conveyance in writing, for the whole period of more than five years next before the commencement of this action.

V. And for further answer in this behalf, defendant says that he, defendant, has been located and settle, with his family upon said mission orchard, as his and their sole and only home, for more than ten years past; that a patent embracing said orchard was issued and delivered by the government of the United States to Joseph S. Allemany on the day of 1858, and while defendant was so residing upon and had the sole and exclusive possession thereof; and that said pl'ff claims and has all his right and title to said orchard by and under the title conveyed by said patent; and this action not being brought or commenced within two years from the time of so issuing said patent, said defendant says that said plaintiff ought not and cannot have or maintain the same against him.

Defendant demands judgment against said plaintiff and his costs herein.

A. M. CRANE,
Attorney for said defendant, E. L. Beard.

Endorsed: Filed Nov. 30, 1861.

CUTLER McALLISTER, *Clerk.*

26 And afterwards, to wit, on the 8th day of December, A. D. 1861, the following was duly entered of record in said cause, to wit:

At an extra term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Thursday, the 5th day of December, in the year of our Lord one thousand eight hundred and sixty-one.

Present: The honorable M. Hall McAllister, judge of said court.

Order granting time to plead.

JULIAN FEDERY
v.
E L. BEARD *et al.* } At common law.

And now at this day, on motion of E. Casserly, esq., attorney for plaintiff, it is ordered that plaintiff have five days from this date in which to plead to the answers of the defendants heretofore filed herein.

Endorsed: Filed 5th day of Dec., 1861.

CUTLER McALLISTER, *Clerk.*

27 And afterwards, to wit, on the 10th day of December, 1861, the following was duly entered of record in said cause, to wit:

U. S. circuit court.

FEDERY
vs.
BEARD *et al.*

Order granting time to plead.

Let the plaintiff in the above action have five more days time to plead to the answers of defendants therein.

M. HALL McALLISTER,
Circuit Judge.

Dec. 10, 1861.

Endorsed: Filed Dec. 10, 1861.

CUTLER McALLISTER, *Clerk.*

28 And afterwards, to wit, on the 16th December, A. D. 1861, comes the plaintiff, by his attorney, E. Casserly, esq., and files his replication to the answer of defendant Beard, in the words and figures following, to wit:

Circuit court of the United States for the district of California, in and for the northern district.

JULIAN FEDERY
vs.
ELIAS L. BEARD *et al.*

Replication to answer of Beard.

Julian Federy, the plaintiff in this action, for reply to the answer of the defendant, Elias L. Beard, says:

It is not true, and he denies, that at the time of the commencement of this action, or at any other time, the said defendant was, or for a long or any time whatever had been, or still is, the owner in fee simple, absolute or otherwise howsoever, by good or indefeasible title, or by any title whatever, or otherwise howsoever, of that part of the premises in the complaint described, known as the orchard of the mission of San José, which is set forth in the answer of said defendant secondly pleaded, or of any portion thereof.

And he denies, generally and specifically, each and every allegation in that behalf in said answer contained.

That it is not true, and he denies, that the said defendant has peace-
29 fully or in his own right, or as his own property, occupied the premises in his said answer set forth, known as the orchard of the mission of San José, or any part thereof, for more than ten years last past, or for any time whatever, or might or could lawfully so do, or has at any time occupied the same, otherwise than as set forth in said complaint, and as a trespasser and wrongfully and unlawfully; and the plaintiff denies that the said defendant, or those under whom he pretends to claim, or any or either of them, ever had during said period, or for any time, or at any time, any title whatever in fee simple or otherwise howsoever thereto, or to any part thereof; and he denies generally and specifically each and every allegation in the answer of said defendant in that behalf contained.

II. And, for reply to the answer of said defendant thirdly by him pleaded, the plaintiff says:

It is not true, and he denies, that neither the plaintiff nor his ancestor, predecessor, or grantor, was not seized or possessed of said land in said answer men-

tioned, (the said orchard of the mission of San José,) within five years before the commencement of this action; that it is not true, and he denies, that he, this plaintiff, has no title to said orchard under title derived from the Spanish or Mexican governments, or the authorities thereof; and he denies generally and specifically each and every allegation in said third answer contained.

30 And, on the contrary thereof, this plaintiff says that he, this plaintiff, was possessed, as in his complaint set forth, and his grantor and grantors was and were seized and possessed of the said premises, and every part thereof, within five years next before the commencement of this action, and that he, this plaintiff, does claim the same, and every part thereof, under title derived from the Spanish and Mexican governments, and the authorities thereof, as well as under title otherwise derived.

III. And for reply to the answer by said defendant fourthly pleaded, this plaintiff says:

It is not true, and he denies, that said defendant has been for more than five years before the commencement of this action, or for any time whatever, or at any time ever was in the possession of said orchard, or any part thereof, under claim of title thereto, or to any part thereof, exclusive of any other right, or otherwise, or that such pretended claim was or is founded upon any written conveyance of said premises, or any part thereof, or that said defendant has for the whole or any part of the period of more than five years, or for any time whatever, or at any time whatever, peaceably or adversely, or in any manner, held said orchard, or any part thereof, or fully or otherwise possessed or occupied the same, or any part thereof, adversely or otherwise, under such pretended conveyance in writing, or under any conveyance in writing whatever or otherwise adversely.

31 IV. And for reply to the answer of said defendant by him fifthly pleaded, this plaintiff says:

It is not true, and he denies, that said defendant has been located or settled with his family or otherwise upon said mission orchard, or any part thereof, as his and their sole or only home or otherwise, for more than ten years last past, or for any time whatever, except as in said complaint set forth, and as therein set forth, or that said patent was issued by the government of the United States to the said J. S. Alemany while said defendant was residing upon or had sole or exclusive or any possession of said land or any part thereof. And the plaintiff denies that he claims or has all his right and title to said orchard by and under the title conveyed by said patent; and he admits that he does claim and has right and title to said orchard by and under title conveyed by said patent, and avers that he also claims and has right and title thereto under title otherwise derived; and the plaintiff denies that this action was not brought or commenced within two years from the time of the issuing of said patent as in said answer alleged or otherwise; and he says that said action was brought and commenced within two years from the time of issuing of said patent and from the date thereof.

E. CASSERLY,
Att'y for Pl'ff.

Endorsed: Filed Dec. 16, 1861.

CUTLER McALLISTER, *Clerk.*

32 And afterwards, to wit, on the 16th of December, A. D. 1861, comes the plaintiff by his attorney, Eugene Casserly, esq., and files his replication to the answer of defendant H. G. Ellsworth, in the words and figures following, to wit:

Replication to answer of defendant Ellsworth.

In the circuit court of the United States for the districts of California, in and for the northern district.

JULIAN FEDERY
vs.
ELIAS S. BEARD *et al.*

Julian Federy, the plaintiff in this action, for reply to the answer of the defendant Henry G. Ellsworth, says:

It is not true, and he denies, that so much of the premises sought to be recovered in this action which are described and set forth in the answer of said defendant secondly pleaded, or that any part or portion thereof, is or are, or at or before the commencement of this action, or at any time, was or were the land, or estate, or property in fee simple, or otherwise howsoever of him, the said defendant, or that the same, or any part or portion thereof, was or were, or still are, occupied or possessed by said defendant as such; and the plaintiff denies generally and specifically each and every allegation in that behalf in the said
33 answer contained.

II. And, further replying, this plaintiff says, it is not true, and the plaintiff denies, that neither he, this plaintiff, nor his ancestor, predecessor, or grantor, were not seized or possessed of the land in the answer of said defendant set forth within five years before the commencement of this action; and he further denies that he, this plaintiff, has no claim to the said premises under title derived from the Spanish or Mexican governments, or the authorities thereof; and he denies each and every allegation in that behalf in the said answer of defendant contained, and, on the contrary, this plaintiff says that he, this plaintiff, was possessed as in his complaint set forth, and his grantor and grantors was and were seized and possessed of the said premises, and every part thereof, within five years next before the commencement of this action, and that he, this plaintiff, does claim the same, and every part thereof, under title derived from the Spanish and Mexican governments, and the authorities thereof, as well as under title otherwise derived.

III. And, further replying, this plaintiff says, it is not true, and he denies, that he, the said defendant, or those under whom he pretends to claim, has or have been in possession of the said premises, or any part thereof, under any claim of title whatever thereto or to any part thereof exclusive of any other right
34 or otherwise howsoever, or otherwise adversely howsoever, or that such pretended claim of title was or is founded upon any written conveyance whatever of said premises, or any part thereof, for more than five years next before the commencement of this action, or for any time whatever, and the plaintiff denies generally and specifically each and every allegation in behalf thereof in said answer contained, and he denies that said defendant has been in possession of said premises, or any part thereof, for any other time or otherwise than as set forth in the said complaint, and as a trespasser, and wrongfully and unlawfully.

E. CASSERLY, *Atty for Pl'ff.*

Endorsed: Filed Dec. 16, 1861.

CUTLER Mc ALLISTER, *Clerk.*

35 *Order of transfer.*

And afterwards, to wit, on the first day of June, A. D. 1863, the following was duly entered of record in said cause, to wit:

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court house in the city of San

Francisco, on Monday, the 1st day of June, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The honorable Ogden Hoffman, U. S. district judge.

JULIAN FEDERY
v.
E. L. BEARD *et al.* } At common law O. C.—No. 355.

And now, at this day, it is ordered by the court, that in accordance with an act of Congress entitled "An act to provide circuit courts for the districts of California and Oregon, and for other purposes," approved March 3d, 1863, all actions, suits, prosecutions, causes, pleas, process, and other proceedings relative to any cause, civil or criminal, heretofore pending in or returnable to the circuit court of the United States for the districts of California, in and for the northern district, be, and they are hereby, respectively transferred, made returnable and continued to this court.

Endorsed: Filed this 20th day of August, 1863.

GEO. C. GORHAM, *Clerk*,
Per HYDE, *D. C.*

Proceedings in court.

36 And afterwards, to wit, on the 7th day September, A. D. 1863, being the day set for the trial of said cause, at the court-room aforesaid, at San Francisco, before the court aforesaid, the following proceedings were had in said cause, and duly entered of record, to wit:

Cause brought on for trial.

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court-house in the city of San Francisco, on Monday, the 7th day of September, in the year of our Lord one thousand eight hundred and sixty-three.

Present: The honorable Stephen J. Field, associate justice of the Supreme Court; the honorable Ogden Hoffman, U. S. district judge.

JULIAN FEDERY
v.
ELIAS L. BEARD *et al.* } At common law.

And now, at this day, this cause having been regularly set for to-day, was called, and the parties thereto, by their respective counsel, came into court—Messrs. Eugene Casserly and Hall McAllister for plaintiff, and Messrs. Crane and Holladay for defendants. Whereupon the following named persons were

37 duly empannelled and sworn as jurors, the issue to try, &c., to wit: Henry O. Howard, Joseph Gordon, J. P. Manrow, George Amerage, C. F. Webster, C. A. Eastman, Westley Diggins, Charles Y. Brown, E. F. Northam, Robert Merrell, A. C. Taylor, Frederick A. Spear; and the trial of said cause was duly proceeded with.

James Thralfall and Charles Siegenfus were sworn and examined as witnesses on the part of plaintiff, and Henry G. Ellsworth was sworn and examined as a witness on the part of defendants.

On motion of plaintiff's attorney, no objection being made thereto, it is ordered that the complaint be amended by striking out that portion of the body thereof reading as follows, to wit: "That the yearly value of the rents and profits of the said premises is five thousand dollars;" also that portion of the prayer of said complaint reading as follows, to wit: "and the value of the rents and profits as aforesaid, with his damages."

On motion of defendants' attorneys, and it appearing to the court that John

Doe, Richard Roe, John Noakes and Richard Noakes, defendants in this cause, have never been served with process herein, nor appeared, and that they are nominal defendants merely, it is ordered *ordered* that said four nominal defendants be dismissed and stricken from the complaint and record.

The evidence on both sides being closed, the cause was submitted to the jury. The jury, after being charged by the court on the law of the case, without leaving their seats, through their foreman, rendered the following verdict, to wit:

Circuit court of the United States for the northern district of California.

JULIAN FEDERY
vs.
ELIAS L. BEARD *et al.*

38 "We, the jury in this cause, do find a verdict for the defendant H. G. Ellsworth, and for the plaintiff against all the other defendants for the possession of the premises first described in the complaint; and in favor of defendants for the second and third described premises in the complaint.

"San Francisco, September 7, 1863.

"E. F. NORTHAM, *Foreman.*"

39 And now, at this day, the following is duly entered of record in said case, 7th September, A. D. 1863, to wit:

Circuit court of the United States for the northern district of California.

JULIAN FEDERY
vs.
ELIAS L. BEARD *et al.*

Verdict.

We, the jury in this cause, do find a verdict for the defendant H. G. Ellsworth, and for the plaintiff against all the other defendants for the possession of the premises first described in the complaint, and in favor of defendants for the second and third described premises in the complaint.

E. F. NORTHAM, *Foreman.*

SAN FRANCISCO, *September* 7, 1863.

Endorsed: Filed September 7, 1863.

GEORGE C. GORHAM, *Clerk,*
Pr. HYDE, *D. C.*

40 And on the said 7th day of September, A. D. 1863, judgment was entered in said cause in the words, terms, and figures following, to wit:

Judgment.

Circuit court of the United States, northern district of California, June term, 1863.

JULIAN FEDERY
vs.
ELIAS L. BEARD *et al.*
At common law.

Come now the said parties, by their attorneys, and the court having ordered this action to be dismissed as to the nominal defendants John Doe, Richard Roe, John Noakes, and Richard Noakes, upon whom no process has been served, and who have not appeared; and the same having been accordingly dismissed as to them, and the jury herein having been empannelled and sworn, the trial of said cause proceeded as to the other defendants, viz: Elias L. Beard, Henry G.

Ellsworth, Ashley Cameron, Michael Gannon, Augustus E. Johnson, and James Threlfall, upon the issues herein joined.

And after hearing the evidence and argument of counsel, the jury, under the charge of the court, return, and find a verdict for and in favor of said defendant, Henry G. Ellsworth, and in favor of the plaintiff and against the other
41 defendants for the first tract of land described in the complaint, and in favor of the defendants and against the plaintiff for the second and third tracts of land described in the complaint.

It is therefore considered, ordered, and adjudged by the court, that the said defendant, Henry G. Ellsworth, be acquitted as to all matters in said plaintiff's complaint charged and alleged against him; that as to the same he go hence without day; and that he do have and recover of and from said plaintiff his costs herein, taxed at twenty-eight $\frac{30}{100}$ dollars, ($28 30.)

And it is further ordered and adjudged that as to the said other defendants, viz: the said Elias L. Beard, Ashley Cameron, Michael Gannon, Augustus E. Johnson, and James E. Threfall, the said plaintiffs do have and recover the first parcel or tract of land described in said complaint as follows: "All that certain tract, piece, or parcel of land situated, lying, and being at the mission of San José, in the county of Alemada, State of California, being the tract including the mission church of the mission of San José, the cemetery which adjoins the church, and the garden of the said mission which adjoins the said church; and being designated upon the plats of the public surveys of the United States as lot number thirty-seven, in township four south, of range one west, and lot number thirty-seven of township five south, of range one west, Mount Diablo meridian, and more particularly bounded and described as follows: commencing at an
42 angle of the adobe wall enclosing the said garden and orchard at the southeast corner of the tract, thence by the true meridan, (the variation of the magnetic needle being fifteen degrees forty-seven minutes east,) south eighty degrees west, along the course of said wall, eight chains and seventy-nine links to the southwest corner of said wall, station; thence south eighty-three degrees fifteen minutes west, at two chains and sixteen links, across an open space, and to corner of wooden fence, and with the fence at six chains the corner of an adobe house on front line of trees, six chains and forty links to stake, station; thence north twelve degrees thirty minutes west, along front line of said tract, and in front of the church and corridor, eleven chains and forty-six links to a stake, station; thence north seventy-six degrees fifteen minutes east, at one chain and seventy links, opposite the corner of a board fence on the right at three chains and ninety links the northwest corner of the adobe wall, including the garden and orchard, and with said wall sixteen chains and eleven links to northeast corner of wall and tract, station; thence south nine degrees east, along the adobe wall, at three chains and eighty-five links, intersects the township line eight chains and ninety links west of the corner to township four and five south on the Mount Diablo meridian line, twelve chains and ninety links to the place of beginning—containing nineteen acres and nineteen hundredths of an
43 acre, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining."

And it is further ordered and adjudged that the plaintiff do have and recover of and from said defendants, Elias L. Beard, Ashley Cameron, Michael Gannon, Augustus E. Johnson, and James Threfall, his costs herein taxed at one hundred and eighty-four $\frac{30}{100}$ dollars, ($184 30.)

And as to the other two tracts or parcels of land in said complaint described as follows, viz: "A certain other piece of land having two springs of water thereon, lying outside of the said adobe wall of the said orchard, to the north or northeast of the said northeast angle of the said wall, and the said two springs;" and a certain other piece of land having a mill-dam and a pond or reservoir of water thereon, lying to the north or northeast, or thereabouts, of the northeast angle

of the said adobe wall, and the said mill-dam, pond or reservoir, together with the mill-race or canal supplied therefrom, and the land over and through which the same passes, and the flouring mill at the end of said mill-race or canal, together with the land on which the same stands. It is ordered and adjudged that the said defendants be, and are hereby, acquitted, and that as to said two parcels of land last described, they do go hence without day.

Dated San Francisco, Sept. 7th, 1863.

44 And now, at this day, to wit, the 7th of September, A. D. 1863, come the defendants and file their bill of exceptions, in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States, tenth circuit, northern district of California.

JULIAN FEDERY
vs.
ELIAS L. BEARD, HENRY G. ELLSWORTH, ASHLEY CAMERON, MICHAEL GANNON, AUGUSTUS E. JOHNSON, JAMES THREFALL *et al.*

Be it remembered that on the trial of this action, the plaintiff, in order to sustain the issue on his part, offered to read in evidence to the jury a patent executed by the President of the United States, in the usual form, purporting to be issued under the act of Congress entitled "An act to ascertain and settle the private land claims in the State of California," passed March 3d, 1851, of which patent the recitals were as follows: "Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States, that, pursuant to the provisions of the act of Congress approved the third day of March, one thousand eight hundred and fifty-one, entitled 'An act to ascertain and settle the private land claims in the State of California,' Joseph Sadoc Ale-
45 many, Roman Catholic bishop of the diocess of Monterey, in the State of California, as claimed, filed his petition on the 19th day of February, 1853, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition he claimed the confirmation to him and his successors of the title to certain church property in California, 'to be held by him and them in trust for the religious purposes and uses to which the same have been respectively appropriated,' said property consisting of church edifices, houses for the use of the clergy and those employed in the service of the church, churchyards, burial-grounds, gardens, orchards and vineyards, with the necessary buildings thereon, and appurtenances, the same having been recognized as the property of said church by the laws of Mexico in force at the time of the cession of California to the United States. And whereas the board of land commissioners aforesaid, on the 18th day of December, 1855, rendered a decree of confirmation in favor of the petitioner for certain lands described therein, to be held in the same capacity and for the uses set forth in his petition, the lands at the 'mission of San José,' being described in said decree as follows:

(Here the lands are described.)

"And whereas it further appears from a certified transcript filed in the General Land Office, that an appeal from said decree or decision of the commissioners having been taken, on behalf of the United States, to the district court of the United States for the northern district of California, and the Attorney General of the United States having given notice that appeal would not be prosecuted in this case, the said district court, on the 16th day of March, 1857, at a stated

term, ordered, adjudged, and decreed that claimant have leave to pro-
46 ceed under the decree of the U. S. land commission heretofore rendered in his favor, as under final decree."

The patent then, after reciting the presentation to the Commissioner of the General Land Office, of a plat and survey of the lands confirmed, the same being set forth in said patent, and which embraces the first-described parcel in plaintiff's complaint of the land in controversy, then, in a habendum clause, in the usual form, gives and grants the said lands to said claimant, Joseph S. Alemany, bishop of Monterey, and his successors, in trust as aforesaid.

The defendants, by their counsel, then and there objected to receiving said patent, or allowing the same to be given in evidence, on the alleged ground that it was void upon its face, inasmuch as it purported to be founded and issued upon a decree of the said board of commissioners after said decree had been removed by appeal to the said United States district court, and without any dismissal of said appeal by said United States district court; and because said case being pending in said United States district court, no patent could be issued upon the decree of said land commissioners until said court had either dismissed said appeal, or upon the evidence in the case had adjudicated upon the title and confirmed said decree.

Which said objections to the receiving said patent in evidence were overruled by the court, and the same was thereupon read in evidence to the jury.

To which ruling of the court, and allowing said patent to be read and given in evidence, the defendants then and there excepted.

The plaintiff then, by certain mesne conveyances made by said Joseph S. Alemany, and his successor in office, showed title, by and under said
47 patent, in himself to the first parcel or tract of land in said plaintiff's complaint described; and the foregoing was all the evidence of title to said property given or offered by the plaintiff.

The defendants then offered to show by the records of the said United States district court, that the only order made in said court recited, as is recited in the patent, that the Attorney General having given notice that he would not prosecute the appeal, the court thereupon ordered that the claimant have leave to proceed upon the decree of said board, as under a final decree; which evidence so offered to be given was overruled and rejected by the court, to which ruling of the court, so overruling said offer, and rejecting said evidence, the defendants, by their counsel, then and there excepted.

Defendants then offered to show and prove, by the petition of the claimant, filed before the late land commission, organized under the act of Congress entitled "An act to ascertain and settle the private land claims in the State of California," passed March 3d, 1851, in the case of Joseph S. Alemany, bishop of Monterey, against the United States, being the same case wherein so much of the land in controversy in this suit, as is specified in the answer of the defendant Beard, as the orchard and vineyard of the mission of San José, was confirmed to said claimant, and in pursuance of which confirmation the patent given in evidence by plaintiff was issued—that said commissioners never had any jurisdiction, by or under said act of Congress, or otherwise, to make or render said decree of confirmation, for the reason, as would appear by said petition, that the claim to
the land, as presented by said claimant to said board, did not set forth
48 any claim or title to the same by virtue of any right or title derived from the Spanish or Mexican government.

And defendants, in connexion with and as a part of said offer, proposed and offered to read in evidence to said court and jury the petition of said claimant in said case, and which petition (omitting only descriptions of the land claimed) reads in these words and figures following, viz:

To the United States commissioners for ascertaining and settling private land claims in the State of California:

The petition and claim of Joseph Sadac Alemany, Roman Catholic bishop of the diocess of Monterey, in the State of California, a corporation sole, respectfully shows, that the Roman Catholic church, in the State of California, of which your petitioner is bishop, under the title of "bishop of Monterey," (and which consists of your petitioner, as such bishop, the various Roman Catholic parish priests and Catholic congregations and people in the said State,) is the owner of, and entitled to various parcels of real estate, situate within the said State, appropriated to the uses of religion, and to the public worship of God, and herein designated as church lands or church property; that the government of the Catholic church in California, prior to its conquest by and cession to the United States, was vested in the Roman Catholic bishop of California; that the territorial limits of your petitioner's diocess of Monterey, and over which his jurisdiction extends, are the same as those of the former Mexican bishopric of California, and includes the whole State of California, and that your petitioner is the lawful successor of the late Rt. Reverend Francisco Garcia Diego, the late Catholic bishop of the diocess of California, as the same existed under the former government of this State.

Your petitioner further shows that by the fundamental law of the republic of Mexico, which was in force in the present State of California at the time of its conquest by and cession to the United States, the Roman Catholic church being the religion of all the people of Mexico, was recognized as such, and for the government of said church and its members, in all ecclesiastical matters and in all things relating to the acquisition, transmission, use, and disposal of property, real or personal, belonging to the church, or devoted or appropriated to religious purposes or uses, or to the service of God, the canon law of the Roman Catholic church was adopted and recognized, and was in force as the law of the republic of Mexico, as it had also been of the kingdom of Spain whilst Mexico was a dependency thereof.

Your petitioner further shows that by the laws of Spain from time immemorial, and by the laws of the republic of Mexico, in force at the time of the cession of California to the United States, it was not necessary that any grant of land for ecclesiastical or church purposes should be evidenced by any deed or writing, public or private, but the right of the church to the property devoted to religious purposes was always recognized, as regulated by the canon law.

Your petitioner further shows that the diocess of California, now called the diocess of Monterey as aforesaid, was and is divided into twenty-one missions and fifteen parishes, and that the property of the church in the said diocess consisted of church edifices, houses for the use of the clergy and those employed in the service of church, *church* churchyards, burial grounds, gardens, orchards, and vineyards, with the necessary buildings thereon and appurtenances, as hereinafter more particularly described—all of which were and are, although of very moderate value, necessary for the decent public worship of God and the administration of the sacraments and sacrifice of the church, according to the rites, ritual, and ceremonial of the said Catholic church, and that the same do not include what were termed the mission lands or mission ranchos, but were entirely distinct therefrom.

Your petitioner further shows that by the canon law aforesaid, and by the laws of Spain and Mexico, as the same were in force at the time of cession of California to the United States, the title, control, and administration of all ecclesiastical or church property was vested in the hands of the bishop and clergy of the diocess within the territorial limits whereof the same was situated, and who, for such purposes, were regarded as a body corporate, the existence and

succession of which was recognized by law, and the title, control, and administration of the church property in the Mexican province of California were vested in the bishop and clergy of said diocess of California, then attached to and forming part of the Catholic church of Mexico.

That by the conquest of California by and its cession to the United States, the said diocess of California became attached to and made a part of the Catholic church of the United States, which is under the government of a national synod of the ecclesiastical authorities thereof, periodically held in the city of Baltimore, in the State of Maryland.

That by the canon law and statutes of the said national synod of Baltimore aforesaid, as the same are in force in the Catholic church in the United States, and formed the regulations and discipline thereof, the church property
51 in the United States is, for motives of convenience, directed to be held by the various bishops of the several diocesses; and that at a diocesan convention of the bishop and clergy of said diocess of Monterey, held in the city of San Francisco in the month of March, one thousand eight hundred and fifty-two, and at which the said missions and parishes were duly represented, it was, for the purposes of conforming the administration of the temporalities of the Catholic church in California to the system prevailing throughout the States of American Union, and to the exigencies arising from the adoption in the State of California of the common law, with its system of land tenure, resolved unanimously that your petitioner, as bishop of the diocess of Monterey, and on behalf of the Catholic church and Catholic people of the State of California, and for the purposes of preserving the same to the sacred uses and purposes to which it has been dedicated, and for which it has heretofore been used, should petition your honors for a confirmation to him and his successors of the aforesaid church property within the State of California, to be held by him and them in trust for the various religious uses and purposes to and for which it has been devoted.

Your petitioner further shows that for the purpose of being enabled so to hold the said church property as aforesaid, and of administering the temporalities of the said church and managing the estate and property thereof, as required by the rules, regulations, and discipline of the said Roman Catholic church, he has been duly incorporated as a sole corporation under and by virtue of statute of the State of California, passed April 22d, 1850, and amended
52 May 4th, 1852, under the name and title of "Bishop of Monterey" as aforesaid.

Your petitioner further shows that the following is a list and description of the said property of the Catholic church in this State, held by the title and tenure aforesaid, and which your petitioner, as such corporation, and on behalf of himself and the Catholic clergy and Catholic population of California, claims in trust for the purposes aforesaid, viz:

[Here the petition describes various tracts of land, and among others the land sued for in this action, and then proceeds.]

Your petitioner further shows that the Catholic church of California had been, at the time of the conquest and cession of California, in actual and undisputed possession of the above-described lands from about the period hereinafter specified, and that such possession also constitutes one of the foundations of your petitioner's claim, viz:

1. Of the church lands at the mission of San Diego, hereinbefore described, since about the year one thousand seven hundred and sixty-nine, in which year said mission was located.

2. Of the church lands at the mission of San Luis Rey, hereinbefore described, since about the year one thousand seven hundred and ninety-eight, in which year said mission was established.

3. Of the church lands at the mission of San Juan Capistrano, herein-

53 before described, since about the year one thousand seven hundred and ninety-six, in which year said mission was established.

4. Of the church lands at the missions of San Gabriel, San Fernando, and San Antonio, hereinbefore described, since about the year one thousand seven hundred and seventy-one, in which year said mission was established.

5. Of the church lands at the mission of San Buenaventura, hereinbefore described, since about the year one thousand seven hundred and eighty-two, in which year said mission was established.

6. Of the church lands at the mission of Santa Barbara, hereinbefore described, since about the year one thousand seven hundred and eighty-six, in which year said mission was established.

7. The church lands at the mission of Santa Inez, hereinbefore described, since about the year eighteen hundred and four, in which year the said mission was established.

8. Of the church lands at the mission of La Purisima, hereinbefore described, since about the year one thousand seven hundred and eighty-seven, in which year the said mission was established.

9. Of the church lands of the mission of San Luis Obispo, hereinbefore described, since about the year one thousand seven hundred and seventy-two, in which year the said mission was established.

54 10. Of the church lands at the missions of San Miguel, San Juan Bautista, and San José, hereinbefore described, since about the year one thousand seven hundred and ninety-seven, in which year the said missions were established.

11. Of the church lands at the missions of La Soledad and Santa Cruiz, hereinbefore described, since about the year one thousand seven hundred and ninety-one, in which year the said missions were established.

12. Of the church lands at the mission of Santa Clara, hereinbefore described, since about the year one thousand seven hundred and ninety-seven, in which year the said mission was established.

13. Of the church lands at the mission of San Carlos, hereinbefore described, since about the year one thousand seven hundred and ninety, in which year the said mission was established.

14. Of the church lands at the mission of San Francisco or Dolores, hereinbefore described, since about the year one thousand seven hundred and seventy-six, in which year the said mission was established.

15. Of the church lands at the mission of San Rafael, hereinbefore described, since about the year one thousand eight hundred and seventeen, in which year the said mission was established.

16. Of the church lands at the mission of San Francisco Solano, hereinbefore described, since about the year one thousand eight hundred and
55 twenty-three, in which year the said mission was established.

He also states that the former Mexican governor of California, after the conquest of the State by the United States, and after his authority had ceased to exist, is reported to have made various fraudulent grants of portions of the aforesaid lands, pretending that the same were public lands, and antedated the same so as to make them appear to have been issued before the conquest of the country; that your petitioner is unacquainted with the particulars of such fraudulent and pretended grants, and cannot state the same any further than he has been informed (he knows not how truly;) that the parties pretending to claim title under them, to portions of the said church lands, are Andreas Pico and Joseph A. Pico, John Foster, Manuel Poli, John Mauro, Richard S. Den, Daniel Hill, Joseph M. Covarrubias, Joaquin Carillo, John B. Temple, John Wilson, Petronilo Ruis, Edward Clay, Beard & Co., Bolton and Barron, Gen'l McG. Vallejo, and that the vineyard at San Juan Bautista is in possession of

Theofilo Echevarria, who, claiming to be alcalde in the year 1848, made a deed thereof conveying the same to himself, and took possession under the same.

Your petitioner further shows that all said pretended titles, even should they be actually what they respectively purport to be, are invalid, by reason that the lands were not public property, and not within the power of the public authorities of Mexico to grant away, but the property of the Catholic church, held by the bishop and clergy of the same for religious uses, as hereinbefore
56 particularly set forth.

Your petitioner therefore prays, on behalf of himself and the clergy and people aforesaid, a confirmation to himself and his successors of the church lands aforesaid, to be held by him and them in trust for the religious purposes and uses to which the same have been respectively appropriated.

And your petitioner will ever pray, &c.

BOTTS & EMMETT.
CASSERLY & DOYLE, *of Counsel.*

Filed in office Febr'y 19, 1853.

GEO. FISHER, *Sec'y.*

Which petition, so offered to be given, the court held did show jurisdiction in said board, and thereupon excluded the same from the consideration of the jury; to which rulings of the court, so excluding the same, the said defendants, by their counsel, then and there excepted.

Defendant further offered to show by said record of said land commissioners in said case, that the facts set forth and presented in the petition above recited in said case, before said board, and the evidence in the record, showed affirmatively that the claimant had no right whatever to said orchard and vineyard, or either of them, by virtue of any right or title derived from the Spanish or Mexican government.

Which offer, so made, was overruled, and the evidence offered to be given, to the effect aforesaid, by said record, was then and there rejected and excluded by the court: to which ruling of the court, so rejecting, overruling, and
57 excluding said evidence, the said defendants, by their counsel, then and there excepted.

Defendants further offered to show by said record of said land commissioners that the claimant had no written or documentary title whatever to said land, but the entire right to the confirmation thereof by said board, and on which said board confirmed the same, was based exclusively upon verbal testimony, showing, or tending to show, that the missionaries or priests of the Catholic church had for many years possessed and occupied the same; and showing, or tending to show, that the former governments of Spain and Mexico had respected and protected such possession. Which offer, so then and there made, was overruled, and the evidence offered to be given to the effect aforesaid, by said record, was then and there rejected and excluded by the court. To which ruling of the court, so rejecting and overruling and excluding said evidence, the said defendants, by their counsel, then and there excepted.

All the aforesaid evidence, so offered to be given by defendants, was objected to by plaintiff, and rejected by the court, on the ground that it was incompetent and inadmissible thus collaterally to impeach the validity of the decree of the land commission.

The defendants then offered in evidence a grant for the said mission, orchard, and vineyard, being the same tract of land first described in the plaintiff's complaint, (excepting the church, cemetery, and priests' houses, made and executed by Pio Pico, constitutional governor of California, to Juan Castenada, Luis Arenas, and Benito Dias,) bearing date June 30th, 1846, and purporting to be a sale of said orchard and vineyard to said grantees for the sum of three thousand dollars.

58 The said grant recited on its face that the governor was authorized previously, by the departmental assembly, "to alienate the missions with the end of preventing their total ruin, and providing the government resources which it requires immediately to attend to its exigencies."

Defendants admitted that said grant had never been submitted, nor any claim founded thereon for confirmation to the board of land commissioners, was wholly unconfirmed, and that the grant is not found and no copy or counterpart thereof, and no record of the same, or of any paper relating to said grant, exists or is found among the archives of the former government of Mexico in California.

Defendants offered to prove that said grant was executed and delivered on the day it bears date, and that the consideration therein named (three thousand dollars) was actually paid by the grantees therein named, at the time of its execution.

Defendants further offered to deraign title to themselves under said grant, viz: That by a deed duly executed said defendant, Beard, acquired title to themselves under said grant, viz: that by a deed duly executed said defendant, Beard, acquired title to one equal undivided third of said orchard and vineyard (being the interest of said Luis Arenas acquired by said grant) on the 15th day of July, 1850, and that said Beard immediately thereafter entered into possession thereof, and has ever since occupied the same under said title; that on the 4th day of November, 1858, said Beard, by deed duly executed, acquired to the other two-thirds of said orchard and vineyard, viz., the interests of said Juan Castenada and Benito Dias, under said grant, and it appeared and was shown by
59 the evidence given by plaintiff that all the other defendants (except defendant Ellsworth) held under said Beard.

To the reception of which said evidence, viz., said grant and said proof of its execution and delivery, and payment of the consideration, and of said deeds of conveyance from and through said Arenas, Castenada, and Dias to said defendant Beard, the plaintiff, by his counsel, then and there objected, and the court sustained said objection, and excluded all of said evidence, on the ground that neither said grant, nor any paper connected therewith, was recorded or found among said archives; and on the further ground that the same had never been presented for confirmation before said board of land commissioners, and had never been confirmed. Said objection was sustained, and said evidence excluded by the court upon the grounds taken by plaintiff as aforesaid. To which ruling of the court, so rejecting said evidence and excluding the same, defendants then and there excepted. It was mutually admitted by the parties on said trial that the first parcel of land described in said complaint was of the value of twenty-five hundred dollars.

And defendants pray that this their bill of exceptions may be signed and sealed and made a part of the record, which is done.

Witness my hand and seal this seventh day of September, A. D. 1863.

(Signed) STEPHEN J. FIELD, [SEAL.]
Circuit Judge.

60 *Citation.*

United States of America, *ss*, to Julian Federy, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of California, wherein Elias L. Beard, Ashley Cameron, Michael Gannon, Augustus E. Johnson, and James Threfall are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the honorable Stephen J. Field, judge of said circuit court, and one of the judges of the Supreme Court of the United States, this 19th day of September, A. D. 1863.

STEPHEN J. FIELD, [SEAL.]
Associate Justice of Supreme Court.
GEORGE C. GORHAM,
Clerk U. S. Circuit Court, Northern Dist. of Cal'a.

UNITED STATES MARSHAL'S OFFICE,
Northern District California.

61 I hereby certify that I have received the within citation on writ of error on the 19th of September, A. D. 1863, and personally served the same by copy on the 28th day of September, A. D. 1863, on Julian Federy, in the county of Alemada, State of California, and at the same time exhibiting the original citation on writ of error in this cause.

San Francisco, September 29th, 1863.

CHAS. W. BAND, *U. S. Marshal,*
By WALLACE COFFIN, *Deputy.*

Endorsed: Filed Sept. 29, 1863.

GEO. C. GORHAM, *Clerk,*
Per HYDE, *D. C.*

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the northern district of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment on the 7th day of September, A. D. 1863, in a plea lately pending before you between Julian Federy, plaintiff, and Elias L. Beard, Henry G. Ellsworth, Ashley Cameron, Michael Gannon, Augustus E. Johnson, James Threlfall, John Doe, Richard Roe, John Noakes, and Richard Noakes, defendants, and wherein said judgment was rendered against said defendants Elias L. Beard, Ashley Cameron, Michael Gannon, Augustus E. Johnson, and James Threlfall, manifest error hath happened, to the great damage of the said last-named defendants therein, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties last aforesaid in their behalf, you are hereby commanded, that if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of Decem-

63 ber next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger P. Taney, Chief Justice of the said Supreme Court of the United States, this nineteenth day of September, A. D. 1863, of the December term A. D. 1862, and of the independence of the United States the eighty-eighth year.

In testimony whereof, the clerk of said circuit court hath hereunto subscribed his name and affixed the seal of the said United States circuit court [SEAL.] this 19th day of September, A. D. 1863.

Attest: GEO. C. GORHAM,
Clerk U. S. Circuit Court, Northern Dis't California.

64 Writ allowed.

FIELD, *J.*

65 Circuit court of the United States in and for the northern district of California.

JULIAN FEDERY
vs.
E. L. BEARD & OTHERS. } At common law.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I, George C. Gorham, clerk of the circuit court of the United States in and for the northern district of California, at San Francisco, do hereby certify the foregoing sixty-four pages to contain a full, true, correct, and faithful transcript of the record of the proceedings had in the above-entitled cause.

Witness my hand and the seal of said circuit court this twentieth day of October, A. D. 1863, and of the independence of the United States the eighty-eighth year.

[SEAL.]

GEO. C. GORHAM, *Clerk.*

Filed 5th December, 1863.

Leeds Land Law 610. Opinion of Black. Rights of third parties cases. Lees v Clark 20 Cal 420

Supreme Court of the United States.

[No. 91.]

DECEMBER TERM, A. D. 1865.

ELIAS. L. BEARD, ET. AL., PLAINTIFFS IN ERROR,

vs.

JULIAN FEDERY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Counsel for the plaintiff in error files the following additional points and argument:

I. ON DEMURRER AND JURISDICTION.

The declaration either consists of one, or of more counts. 1. If it consists of *only one* count, then it is doubly defective for *duplicity.* 1. Because *it unites in one and the same count several distinct causes of action* for the recovery of several distinct and detached pieces of land. 2. Because it unites in the same count and in the same action a joint claim for the recovery of entire damages for the detention of the whole land composed of several distinct parcels. (Printed Record, pp. 1, 2; p. 5, art. 9, 10.)

In England, and the courts of the United States, it is not allowable to join in an action of ejectment a claim for mesne profits. The damages recoverable in the action of ejectment are *merely nominal.* (3, Greenleaf's Evi., § 332.)

In this case, *the value* of *the land* in controversy was not stated in the declaration so as to give the Court jurisdiction of the case; but the jurisdiction is made to depend on the amount of the damages, viz: $1,000, and the claim for mesne profits, $5,000, which could not be recovered in the action. To give jurisdiction in ejectment in the courts of the United States, *the value of the land must be stated in the declaration* to exceed $500; otherwise the suit will be dismissed. (Lanning *vs.* Dolph, 4 Wash. C. C. R., 624.)

Without here noticing the diversities of decision and practice on this subject of jurisdiction, it is sufficient to say, that by the latest decision of this Court *jurisdictional facts*—that is, those necessary to confer jurisdiction on the courts of the United States—*must appear affirmatively* IN THE PLEADINGS, or the judgments of inferior courts will be reversed by this Court, whether the exception was made in the court below or not. (Dred Scott Case, 19 Howard's U. S. R. Pp. 401–402, Taney, Ch. J.; ib., p. 456, Mr. Justice Wayne; ib., pp. 472–474 Mr. Justice Daniel; ib., p. 565, Mr. Justice Curtis. See also 1 Brightly's U. S. Dig., p. 127, and authorities cited in notes.)

The claim for damages and mesne profits was subsequently abandoned on the trial. (Printed Record, p. 13.) This, UNDER THE PLEADINGS, left the court without jurisdiction of the case. The agreement on the trial, that the land recovered was worth $2,500, forms no part of *the pleadings*. If, therefore, the jurisdictional facts necessary to confer jurisdiction must appear *in the pleadings*, the Circuit Court, under the pleadings at the trial, had no jurisdiction of the case, and the judgment must be reversed.

2. If, on the contrary, the declaration consists of two or more DIFFERENT counts, then it is defective in several essential particulars. 1. Because it is not alleged by the second and third counts that the plaintiff was *possessed* of the second and third parcels of land. 2. Because their localities, boundaries and quantities are not given with proper and convenient certainty, or with any certainty whatever. (Printed Record, p. 5; arts. 5 to 8.)

The code of California requires that "in an action for the recovery of real property, such property shall be described, with *its metes and bounds*, in the complaint." (Woods' Cali-

fornia Dig., p. 174; art. 792.) In this respect, these parts of the declaration are defective, whether it is regarded as composed of *one*, or of *several* counts.

3. Because, also, the *dates* of the plaintiff's possession of the second and third parcels of land, and of his ouster therefrom, are not given.

There is no escape from this *dilemma*. The declaration was defective in either aspect, and the demurrers should have been sustained.

Technical defects must be judged of by the standard of technical property, as of the time when the objection is made. If it had been sustained, several of the defendants would have been relieved from the trouble, expense and cost of a trial in the court below and in this Court.

II. Rulings on the Trial.

The defendant, Beard, (under whom the other defendants held) was in possession, and had been in possession for thirteen years before the trial; and he and his grantors had been in possession for upwards of seventeen years *under color of title* at least, viz: a sale and conveyance of the land in question, purporting to have been made by Pio Pico, the Governor of California, June 20, 1846. (Printed Record, pp. 21, 22.)

The court below on the trial held that the *decree* of the land commission, and the *patent* issued thereon, under which the plaintiff claimed, *were conclusive* evidence of his title, and would not allow either of them to be attacked collaterally.

The *conclusiveness* of the decree and of the patent under which the plaintiff claimed was *the principle* which governed all the rulings of the Court excluding the evidence offered by the defendants.

Now, if the Court was in error on this point, then the judgment of the court below must be reversed.

Accordingly the plaintiffs in error contend:

I. That the said decree and patent were *not conclusive* upon the defendants, either by the principles of the common law, or by the provisions of the act of March 3, 1851.

1. *By the principles of the common law.*

The rule and its rationale and exceptions are stated in 1 Starkie on Evid., Edit. 1843, p. 253. "A decree or judgment between the *same parties* upon the *same subject matter*, is usually conclusive as to private rights—on the contrary, it as an elementary rule and principle of justice, that no man shall be bound by the act or admission of another to which he was a stranger, and consequently *no one ought to be bound* as to a matter of private right by *a judgment or verdict to which he was not a party, where he could make no defence, from which he could not appeal, and which may have resulted from the negligence of another, or may even have been obtained by means of fraud or collusion.*" (Ib.)

To this rule there are some exceptions—as, where the judgment has been rendered in a *proceeding in rem;* or, where the party against whom the judgment is offered as evidence is a *privy in law or in estate* of one of the original parties to the judgment. (Ib., pp. 254, 257, &c. See, also, 1 Greenleaf's Evid., § 23, 24, and notes, Ib., § 556.)

But the proceeding in the land commission was *not* a proceeding *in rem*—nor were the defendants in this case either parties or privies in law or estate of the United States. On the contrary they claim *adversely* to both the parties to that litigation. They claim under an *independent grant* from Mexico, and by *adverse possession* under the statutes of California.

But even admitting the principle held by the court below, it has no application to this case, because it has been decided by this Court that the land commission was *not a court;* (U. S. *vs.* Ritchie, 17 Howard's U. S. R., pp. 533, 534;) and if not, it could render no judgment which can be entitled to the protection of that rule.

2. *By the provision of the act of March* 3, 1851.

By the 15th section of that act it is expressly provided as follows:

"The *final decrees* rendered by said (land) commissioners, or by the district or Supreme Court of the United States, or *any patent* issued under the act, shall be *conclusive between the United States and said claimants only*, and *shall not affect the interests of third persons.*" (1 Brightly's U. S. Dig., p. 114, pl. 48, and authorities there referred to.)

Language could not express a proposition more clearly. It is expressly declared that neither the *decree* nor the *patent* shall be *conclusive* upon any but the United States and the claimant—while the rights of all the rest of the world are expressly reserved and protected from any inference to the contrary. It is not even declared that they shall be conclusive against "privies in law or estate," holding under the United States—and, if the *affirmative* of one thing can be regarded as a *negative* of all but what is expressed, *even they are not bound.* But as to third parties, and especially as to parties *claiming adversely* to both the parties to the proceeding in the land commission, there cannot be the slightest shadow of authority under that act for saying that they are bound either by its decree or by the patent issued under it. *It expressly declares the contrary.*

Nevertheless, the court below held them to be *conclusive* upon the defendants, *excluded* their evidence attacking the decree, (Printed Record, p. 21,) and directed the jury to find a verdict for the plaintiffs. In this we allege there was double error, and the judgment must be reversed on both grounds.

It follows that if the decree and patent were *not conclusive* evidence against the defendants, their force might have been overcome by opposing evidence; but all evidence offered by the defendants, attacking the validity of the decree and patent, or in support of their title, was excluded by the court; all of which was a consequence of the former error.

3. The court in its rulings overlooked also the distinction between the *competency* and the *sufficiency* of evidence. The first belongs to the *court*, the second to the *jury*. (1 Greenleaf's Evid., § 2.)

The evidence offered by the defendant may not have been *sufficient* to vindicate his title; but it certainly was *competent*, and the court erred in excluding it from the consideration of the jury.

The court cannot take from the jury the right to weigh evidence. (9 Peters, U. S. R., 292. 2 ib., 227.)

The defendant should be allowed to show his title, though it be junior to the plaintiff's. (4 Barr, (Penn.) R., 420.)

4. The defendants' title and possession were *prior* to the seizin of the plaintiff under the patent under which he

claimed. They could not, therefore, be regarded as having ejected him. (20 Howard's U. S. R., p. 32.)

The only evidence of title to the land in question offered by the plaintiff, was the patent to Bishop Alemany, with a deraignment of title by mesne conveyances from him to the plaintiff. By the record it is distinctly stated: "the foregoing (the patent) was *all* the evidence of title to said property given or offered by the plaintiff." (Printed Record, p. 17.) The *date of the patent* is not stated in the bill of exceptions, but it must have been issued *subsequent* to March 16, 1857—the date of the order of the United States district court giving the claimant leave to proceed under the decree of the United States land commissioners, as under a final decree. (Ib., p. 16–17.)

Defendants offered to show title, and possession under it, as far back as June 20, 1846—a date prior to the decree and patent under which plaintiff claimed. The defendant's title and possession, therefore, *antedated* those of the plaintiff, as he offered no evidence of title or possession prior to those of the defendant. The presumption of law, therefore, was in favor of the title of the defendant. "*Potior est conditio defendentis.*" The plaintiff must recover upon the strength of his own title—not upon the weakness of his adversary's. In this case the plaintiff, as we have seen, offered no evidence but his patent and its recitals, and, among other recitals, that of the decree of the land commission.

Now the act of Congress, as we have seen, so far from making these *conclusive evidence* against the defendants, as was held by the Circuit Court, expressly says that as against them *they shall be no evidence at all.* "The *final decrees* rendered by said commissioners, or by the District or Supreme Court of the United States, or *any patent* issued under the act, *shall be conclusive between the United States and the said claimant only*, and *shall not affect the interests of third persons.*"

The mere fact of the *occupancy of lands* by the church, did not *prove title* in the church to *any particular tract of land* as against a third party. They occupied large tracts of land adjacent to the mission, of which subsequent grants were made to others. Supposing Alemany had got a decree including some of those tracts subsequently granted; it might be contended, on the same principle as that ruled by the court, that it would be *conclusive* against that subsequent title. There are many such cases in California. A principle which leads to such consequences must be erroneous.

Supposing the church to be entitled to *some* land adjoining the churches for *religious uses*; the claim made by them in an *ex parte proceeding* against the United States, is not evidence against third parties of the *true extent of its claim.* That can only be determined, as against them, after *evidence of its extent;* but none was offered by the plaintiff, and that offered by the defendants was *excluded* by the action of the court. (See Record, p. 21.)

The confusion on this subject arises from *overlooking* the act of Congress, and *confounding* patents issued by the United States for lands of which it is *the legal proprietor*, with patents issued under the act of March 3, 1851, for lands claimed under Spanish and Mexican grants in California, which confer no title, and are merely *quit-claim deeds* on the part of the United States. The former are evidence, and *conclusive evidence;* but the latter are not evidence at all, as against third parties. If decisions of this Court and of the courts of the State of California shall be quoted against this view, my answer is, the express provision of the act of Congress on the very point. This question, as presented nakedly by the patent alone, without other evidence, seems never to have been presented or considered by this Court. So long as the act of Congress remains unrepealed, a patent issued under the act of March 3, 1851, cannot be held to be *conclusive evidence against third parties, even if evidence at all.*

The plaintiff, therefore, offered *no legal evidence of title*, as against the defendants, and they should, therefore, have had a verdict, on well-established principles, under the direction of the court.

A party who either had or had not title, under any right or title derived from Spain or Mexico, acquires none *as against third parties by a patent from the United States.* A patent in such a case only protects the claimant *against the United States.* His original title or possession must be shown, as against all others; and if he cannot show any, then the parties in possession cannot be ousted by the patentee or those claiming under him. Such is precisely the condition of things in this case.

The court therefore erred in instructing the jury, *under the evidence in the case*, to find a verdict for the plaintiff for the premises first described in the complaint. That the court did so instruct the jury, is evident from the rulings shown by the bill of exceptions, (Printed Record, pp. 16–17. 21,) and by this statement of the record: "The evidence on both

sides being closed, the cause was submitted to the jury. The jury, *after being charged by the court on the law of the case, without leaving their seats*, through their foreman, *rendered their verdict*," &c. (Ib., p. 14.)

For the argument on the other points of the case, the court is referred to the argument of my associate, Judge Crane, which is filed in the case.

JOHN A. WILLS,
For Plaintiffs in Error.

In the Supreme Court

OF THE

UNITED STATES.

ELIAS L. BEARD, ET. AL.,
Plaintiffs in Error.

VS.

JULIAN FEDERY,
Defendant in Error.

Brief of Plaintiffs in Error.

A. M CRANE,
Of Counsel for Plaintiffs in Error.

SAN LEANDRO:
ALAMEDA COUNTY GAZETTE JOB PRINT.
1865.

Supreme Court of the United States.

E. L. BEARD, ET. AL.,
Plaintiffs in Error.

vs.

JULIAN FEDERY,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

Error from the Circuit Court of the United States for the Northern District of California.

The action was an ejectment to recover certain lands situate in Alameda county, within said Northern District of California, and the defendant in error, who was plaintiff in the action, had a verdict and judgment for a portion, viz: One of the three tracts which he sought to recover.

It is shown by the judgment that the tract recovered consists of nineteen acres and $\frac{19}{100\text{ths}}$ of an acre, and included the Church, Cemetery, and Garden adjacent.

To so much of the land as embraces, the Church and church buildings, containing two acres, defendant Beard, in his answer, (Beard, p, 8,) disclaims any right; and as to the balance, about seventeen acres, claimed ownership in fee.

The verdict was in favor of defendant Ellsworth, and against Beard and the other defendants. All the other defendants claimed under Beard.

The Plaintiff makes title under the Catholic Church, to the Bishop of which, Joseph S. Alemany, a Patent had been issued by the United States, embracing the land recovered.

The Bill of Exceptions shows, (Record, p. 16 and 17,) that said Patent, on its face, purported to have been issued in virtue of proceedings taken under the Act of Congress passed March 3, 1851, "To ascertain and "settle the private land claims in the State of California."

The said Patent, and various mesne conveyances under it, constituted the only evidence of title to the premises, offered by the Plaintiff. (Record, p. 17.)

The defendants objected to receiving the said Patent in evidence on the alleged ground that it was void upon its face, inasmuch as it purported to be founded and issued upon a decree of the Board of Commissioners after said decree had been removed by appeal to the said United States District Court, and because, the case being pending in said United States District Court, no Patent could issue upon the decree of said Land Commissioners, until said court had either dismissed said appeal, or, upon

the evidence in the case, had adjudicated upon the title, and confirmed said decree.

The recital upon the face of the Patent, showing as defendants contend, that no dismissal of the appeal, or final adjudication has ever been made is as follows:

"And whereas, it further appears from a certified "transcript filed in the General Land Office, that an appeal "from the said decision of the Commissioners having "been taken on behalf of the United States for the "Northern District of California, and the Attorney "General of the United States having given notice that "an appeal would not be prosecuted in this case, the said "District Court, on the 16th day of March, 1857, at a "Stated Term, ordered, adjudged and decreed that "claimant have leave to proceed under the decree of the "United States Land Commission heretofore rendered in "his favor, as a final decree."

In connection with this recital, defendants offered to show by the records of said District Court, that the only order made in said District Court is the same as is recited, as above quoted, in the Patent.

This evidence and objection was overruled and defendants excepted. (Record, pages 16, 17.) In this the court erred.

The 10th section of the act to ascertain and settle the private land claims in the State of California provides that when the case has been removed to the District Court, that such "Court shall proceed to render judgment "upon the pleadings and evidence in the case and upon "such further evidence as may be taken by order of "said Court." This has never been done by said District Court.

The only thing done was, upon a notice of the Attorney General being in some way brought to the knowledge of the Court, to order that defendants have leave to proceed under the decree of the Land Commission. If the Attorney General had resolved not to prosecute the appeal, the District Court should, on motion of the United States Attorney, have dismissed the appeal, or ordered a confirmation of the decree of the Commissioners. A mere notice from the Attorney General, filed in Court, saying that he declined to prosecute the appeal, did not in law operate as a dismissal. Even a formal dismissal filed by him would not operate as such, without an order of the Court thereon, that the appeal be dismissed.

The amendatory Act of 1854, provides in substance, that if the Attorney General shall fail, within six months after receiving a transcript to give notice that the appeal will be prosecuted, the appeal shall be regarded as dismissed. Even in such case however, it would no doubt be necessary to enter an order of dismissal. Until that be done the Court has taken no action in the matter, and the case is not dismissed, no more than an appeal would stand dismissed in this Court upon the mere filing of a dismissal with the clerk, without an order duly entered to that effect. The case is therefore yet pending, undetermined, and undisposed of in the said District Court, and the claimants have gone on and procured their Patent under a decree of the Commissioners, as yet pending on an appeal duly taken.

It would be waste of time to argue that the Patent is void, and should have been excluded from the jury. When the claimants shall have procured the case to be disposed of in their favor in the District Court, then they will be

in a situation to apply for and procure a valid Patent. Now, with their case still pending in that tribunal, their Patent is void.

Defendants for the purpose of destroying the effect of the Patent, by showing that the Commissioners had no jurisdiction to take cognizance of or confirm said claim, offered to give in evidence the petition made by said Allemany, in behalf of said Church, before said Board, by which petition, it is alleged, it would appear that the said petitioner "*did not set forth any claim or title to the "same by virtue of any right or title derived from the Spanish "or Mexican Government.*" (Record, p. 17.)

The evidence so offered was rejected by the Court, to which ruling the defendants excepted, and the petition, made before said Board, is set forth in the bill of exceptions. (Pages 18 to 21.)

This petition states in substance:

I. That the Catholic Church in California is the owner of sixteen different parcels of land enumerated therein, the 10th of which enumerations embraces the lands of the Mission of San Jose—the land sued for in this action:

II. That under the Spanish and Mexican law, that the Catholic religion being that of all the people of Mexico, the cannon law of said Church was adopted and recognized, as the rule for the government of the Church, and all its temporalities:

III. That by the laws of Mexico in force at time of the cession of California to the United States, it was not necessary that any grant of land for Ecclesiastical or

Church purposes, should be evidenced by any deed or writing, public or private, etc.:

IV. That the Bishop and Clergy, under the laws of Spain and Mexico, were regarded and recognized by law as a body corporate in whom was vested the management, disposition and control of all Church property:

V. That a Diocesian Convention held at Monterey in March, 1853, authorized the petitioner, Alemany, to petition the Board for a confirmation of said land to him in trust for the Catholic Church:

VI. That said Alemany has been incorporated as a sole corporation under the Statute of California, for the purpose of being enabled to hold said Church property:

VII. A list or description of said Church property, "*held by the title and tenure aforesaid*," showing how long, and for what period of time, the Church had held "*indisputable possession*" of the same:

VIII. States that various fraudulent grants have been made to portions of said land by the former Mexican government of California:

IX. Prayer for confirmation.

In connection with this petition defendants "offered to "show by said record of said Land Commissioners, that "the claimant had no written or documentary title whatever to said land, but the entire right to the confirmation thereof by the Board, and on which said Board confirmed the same, was based exclusively upon verbal "testimony, showing, or tending to show, that the Missionaries, or Priests of the Catholic Church had, for

" many years, possessed and occupied the same, and " showing, or tending to show, that the former governments " of Spain and Mexico had respected and protected such " possession."

This evidence was excluded by the Court and defendants accepted. (Record, p. 21.)

I.

Upon the evidence thus offered and rejected the question arises whether, the Board of Commissioners had any jurisdiction to take cognizance of said claim; in other words, *had they any jurisdiction of the subject matter?*

If they had not, it must follow that their decree of confirmation was void, and the Patent, issued upon it, equally void.

We shall attempt to show that the Board had no jurisdiction.

The 8th section of the Act of Congress before referred to

Provides, "That each and every person claiming lands " in California, *by virtue of any right or title derived from* " *the Spanish or Mexican government*, shall present the " same to the Commissioners, together with such docu- " mentary evidence, and testimony of witnesses as said " claimant relies upon in support of such claim," etc.

From the language quoted, it is quite clear that a petitioner under said act must present a "*right or title* " *derived from the Spanish or Mexican government.*"

If, from the petition presented, it clearly appears, from the facts therein stated, that the claimant has no right or title whatever, derived from either Spain or Mexico, the case presented falls without the the jurisdiction of the Board.

The whole sum and substance of the case made by the Catholic Church before the Board, by their petition and evidence was simply this, and nothing more, viz:

"We have peacably, and without question, and under "government protection, possessed this land for a long "series of years."

Does this show, or have the most remote tendency to show, any title to the land in the claimants?

Does it not, rather, affirmatively show that they have no title whatever?

For all the purpose of showing a title he might as well have stated that the Roman Pontiff gave the Church whatever right they have to the lands, and then they would have presented a claim derived, not from Spain or Mexico, but from the Pope.

They merely state that the Church had been in the possession of the land sued for since 1797, up to shortly before the American conquest. (Record, p. 19, 20; sub. 10.)

And they state (p. 20,) "that such possession also "constitutes one of the foundations of petitioner's "claim."

The testimony given before the Board, and upon which

the decree of confirmation was based, as above stated, showed "that the entire right to the confirmation thereof, "and on which the said Board confirmed the same, was "based exclusively upon verbal testimony, showing, or "tending to show, that the Missionaries, or Priests of the "Catholic Church had, for many years, possessed and "occupied the same; and showing, or tending to show, "that the governments of Spain or Mexico had respected "and protected such possession." (Record, p. 21.)

It can hardly be necessary to refer to authorities in support of the proposition that, such permissive possession by the Missionaries or Priests of the Catholic Church, conferred upon the Church no title whatever to the land thus occupied by them: *And that, consequently, the fact that it was so occupied had no tendency whatever to show any title in the Church.*

In 1856, an action of ejectment was brought by Nobili, Priest of the Mission of Santa Clara, against one Redman, to recover the Orchard of said Mission, founding his right of recovery upon peacable possession by the Priests and Missionaries, under government protection.

The case is very fully reported in 6th California Reports 225.

The plaintiff was non-suited in the Court below. The Court thus in effect holding that the possession of the land by the Missionaries or Priests, had no tendency whatever to show title in them, and this decision was affirmed by the Supreme Court.

The case was very fully argued, as may be seen by the briefs of the counsel.

Without quoting the opinion of the Court at large, it is sufficient to say that it was held that

"The lands occupied by the Missions were not conveyed "to any one, but remained the property of the govern- "ment; and even the Church buildings did not become "the property of the Church corporate until after the "decree of secularization of 1833.

The Court further held that

"The Missions established in California prior to its "acquisition by the United States were mere political "establishments and in no manner connected with the "Church."

And further

"The fact that Monks or Priests were at the heads of "these institutions, proves nothing in favor of the claim "of the Church to universal ownership."

This Court in the case of the United States vs. Cruz Cervantes, 18 Howard, 553, held substantially the same opinion. The facts of that case showed that a large tract of land appurtenant to the Mission had been conveyed to Cervantes, and an objection made that it was mission land and therefore not grantable under the colonization laws, the Court say that, "the large tract of land appur- "tenant to the Mission establishments, were never vested "in the Church or in any other corporation or individual "by any grant or legal title," etc.

And the same principle was held in the United States vs. Ritchie, 17, Howard 525.

We do not propose to discuss at large the question of

the right of the Catholic Church to the Orchards and Gardens adjacent to their establishments, and were we so disposed could not do better than to re-produce the excellent brief of the counsel respondent, in the case of Nobili vs. Redman, extending from page 333 to 341, 6th California, and to which the Court is respectfully referred.

The argument of Mr. Hawes is full, exhaustive—replete with authorities—and shows conclusively that no such right or title ever existed.

To the Church edifice, and all the buildings therewith connected, the yard of the Church and the Cemetery, we concede that the Church had good title, under the secularization law of 1833. To those, and the ground which they embrace, in all about two acres, Beard in his answer disclaims any right.

(Beard's answer, Record, page 8.)

But to the Orchard and Vineyard of near eighteen acres he disputes their title, and sets up title in himself, and also ten years possession and the statute of limitations.

It may be stated as a legal proposition respecting which there can be no room for cavil,

That the derivation of a claim or title, under the Act of Congress, from Spain or Mexico, is a jurisdictional fact, and unless such fact affirmatively appears upon the face of the proceedings, any decree made by said Board is void.

The Board was a special tribunal, created for a special purpose, having power and authority to pass upon and

We do not propose to discuss at large the question of

adjudicate such titles or claims to land in California as were derived from one of these sources.

And they had no jurisdiction to hold cognizance of or to decide upon *any other* claims or titles.

But the record in this case shows that the Board did assume jurisdiction of and act upon a pretended claim or title, the facts in respect to which show that it was no valid title or claim whatever,—much less one derived from either of the governments named.

The record enters into and forms a part of, and indeed is the foundation of the Patent which was the basis of the plaintiff's recovery.

The decree of confirmation, founded as it is upon subject matter beyond and out of the jurisdiction of the Board, is void, and, and the Patent founded upon it is equally so.

But again, and as a further reason why said decree is void, the said Board had no power to pass definitely, by decree of confirmation, upon the title to any of the lands held by the Missions, such as the orchard and vineyard in this case was.

Section 16, of the before quoted Act of Congress organizing said Board of Commissioners, provides, "That "it shall be the duty of the Commissioners herein pro- "vided for, to ascertain and report to the Secretary of the "Interior the tenure by which the Mission lands are "held," etc.

Had the Commissioners within the fair purport and

purpose, having power and authority to pass upon and

purview of this statute, any power to do anything else than to report in regard to the tenure of these lands?

This very provision, in itself, fully answers the question.

The power to do the one, (*i. e.* to *report*,) necessarily, and by conclusive implication, excludes the power to do the other—*i. e.* to confirm, or pass definitely upon the title in favor of any claimant.

That this Orchard was "Mission land" admits of no question. As such it is characterized in the petition of the Catholic Church presented through its Bishop Alemany, to the Commissioners, which states that it had been occupied by the Priests and Missionaries since 1797, up to shortly before the American conquest.

We contend therefore, that within the case of Patterson vs. Winn, 11 Wheaton, 380, the Patent in this case is void, because it was issued upon a void decree of the Board of Commissioners, a decree not founded upon the kind of claim or title, (*i. e.* derived from the government of Spain or Mexico,) which they had any power or jurisdiction to pass upon, but on the contrary upon a claim (*i. e.* "the tenure by which the Mission lands are held,") upon which they were required, as we have seen to report, and hence, impliedly, not to adjudicate.

Nor can it be said that the Board have adjudicated that the title was one falling within their jurisdiction, and that therefore their jurisdiction is conclusive. Even if they had so decided, this would be merely the begging of the whole question, upon which jurisdiction depends. The *facts* must show jurisdiction, and it cannot be as-

The land claimed (*i. e.* the 18 acres of Orchard and Vineyard sued for in this case,) never was "Church prop-" erty," and never was "recognized" as such by "the laws " of Mexico."

This is fully settled by the cases above quoted from 6th California, and 17th and 18th Howard, and the Patent reciting and setting forth as the sole foundation of the title what is legally and historically false, must, necessarily be void, as much so as would a Patent signed by the President of the United States which should recite that, whereas the American Fur Company have for more than thirty years, occupied, with the assent of the government the establishment of Fort Laramie and one hundred acres of land adjacent, and that therefore the said company have good title thereto, and the said establishment and land is conveyed to them.

This Court could not, for a moment, hesitate to pronounce such a Patent void upon its face.

There is nothing in the recitals of the Patent in the case at bar which can place it in any more favorable light or on any better foundation, than one would be in the case supposed.

It can hardly be necessary to extend the argument, and it now only remains to be seen whether this void decree, of the Board of Commissioners, which the claimants were so careful not to submit to the scrutiny of either the District Court or this Court, but by procuring a dismissal of the appeal excluded this, hurried it to the land office [illegible] appeal was hastily dismissed, and now for the first time this Court is informed that notwithstanding their

of all their proceedings, including the Patent, to be worthless.

Whether the Catholic Church can now come into this Court, and flaunting its Patent, in effect say, true you have solemnly decided that the Church never had any ownership in or title to, these lands—and it is true that the Supreme Court of California, in a well considered case brought by the Church to recover the Mission Orchard of Santa Clara, and in all respects precisely like this, have also held the law to be as announced by this Court, yet in spite of your decision, and in spite of the law we have got our Patent, and although the proceedings on which it was founded, and its own recitals show that in point of fact and of law neither the confirmation nor the Patent are founded upon any claim derived from either the Mexican or Spanish governments—and although it is in like manner shown that the Board of Commissioners have, to *make* us a title, *adjudicated* definitely upon the "tenure by which the Mission lands are held," when by the terms of the law from which as a special tribunal, they derived their sole authority, they were authorized only to make a *report* upon the subject—yet having in defiance of all this procured our decree, *our dismissal of the appeal*, and our Patent—you are estopped even to read its recitals or the decree it rests upon to ascertain whether or not it is void.

Upon such an assumption must rest the validity of the title upon which the plaintiff's right to recover, if such right he shall be held to have, is predicated.

It would be hard to conceive of or state the case of a

void Patent by reason of the same being issued without authority of law. if this be not such.

II.

We pass now to the consideration of the title under which defendant Beard, and the other defendants under him, claimed to hold the orchard and vineyard of eighteen acres; which, together with proofs of ten years possession under it, was offered in evidence and rejected by the court.

The grant so offered and reiected (Record 21,) was one made and executed by Pio Pico, constitutional Governor of California, to Juan Castenada, Luis Arenas, and Bonito Dias, bearing date June 20th, 1846, and purporting to be a sale of said orchard and Vineyard, *i. e.* the first tract of land described in the complaint, (and the only tract which plaintiff's recovered)—excepting however the Church, Cemetery and Priest's houses,—and expressing the consideration of three three thousand dollars.

The grant offered recited that the Governor was authorized previously by the Departmental Assembly "to " alienate the Missions with the end of preventing their " total ruin, and providing the government resurvey which " it requires to attend to its exigencies."

Defendants admitted that said grant had never been submitted, nor any claim founded thereon, for confirmation by the Board of Commissioners,—was wholly unconfirmed, and the grant is not found, and no copy or counterpart thereof, and no record of the same, or of

any paper relating to said grant exists, or is found among the archives of the former government of Mexico in California.

Defendants offered to prove that said grant was executed and delivered on the day it bears date, and that the consideration therein named (three thousand dollars) was actually paid by the grantees therein named at the time of its execution, and that by subsequent conveyances from the grantees, above named defendan Beard acquired the entire title to said orchard and vineyard—entered into its possession in 1850, and has ever since been in possession under that title—and that the other defendants (except Ellsworth, who was acquitted,) hold under said Beard. (Record 22.)

All this evidence was objected to by plaintiffs—rejected by the Court—and defendants excepted, and now allege such rejection as error.

There seems to have been two objections made to the reception in evidence of the grant offered.

That it had never been presented or submitted to the Board of Land Commissioners for adjudication, and

That no record of it is found amongst the archives of the former government of Mexico.

As to the necessity of presenting the same to the Board of Land Commissioners:

We contend that the title in this case was a perfect one.

It was not a colonization grant, but was a sale of the orchard and vineyard of the Mission of San Jose, made by the Governor for three thousand dollars cash paid him at the time by the grantees. The sale was made by the Governor in pursuance of an order or decree of the Departmental Assembly, in order to raise money to aid the Mexican government in the war in which it was then engaged with the United States.

No question was, or indeed could be made of the power of the Governor to grant the land.

It exactly described the tract granted so that no subsequent measurement was necessary to fix its boundaries.

The full consideration of three thousand dollars was paid at time of its delivery, and nothing remained to be done by way of conditions either on the part of the government or of the grantees.

The title thus being in every respect a perfect one, it was protected as well by the Treaty of Gaudulpe Hidalgo, as by the laws of nations.

Congress, after that treaty had not power to pass any act, compelling the grantees of perfect titles to submit them to a board of commissioners, upon pain of forfeiture upon failure to do so.

Nor is the Patent issued to the Catholic Church, conclusive or indeed any evidence whatever against the title offered defendants. In the language of the court in Leese vs. Clark, 20 Cal. 425, (Field J.) "they hold under an independent title arising previous to the acquisition of the country, and are not bound by the decree or patent for

" they do not *hold* in subordination to the action of the " government, nor by any title subsequent, but by title " arising anterior to the conquest."

This question has undergone an examination in Brower vs. Minturn, 24th California, 644.

The able opinion of Judge Curry in that case, which met the concurrence of all the other Judges, is conclusive both upon reason and authority.

The principle decided is, that,

The titles of such persons to their lands as were perfect at the time of the acquisition of California by the United States, remained as valid under the new government as they were under the old, and without having been presented to the Board of Commissioners for confirmation may be asserted and maintained in the Courts of the Country.

We respectfully refer to the opinion in this case.

The question is one which has never been made in this Court, or decided.

We do not regard the *obiter dictum*, in Fremont's case 17, How. 553, and in Fossat's case 21, How. 447, as the decisions of this Court upon the question now made, simply beause no such question was raised or necessarily involved in either of those cases.

We can add nothing by way of reason or authority to the opinion of Judge Curry in the case referred to, and therefore leave this point without further discussion.

The remaining objection is that there is no record evi-

In his replication to that averment of the answer above quoted the plaintiff says: "that he, this plaintiff, does "claim the same and every part thereof under the title "derived from the Spanish and Mexican governments "and the authorities thereof, *as well as under title otherwise derived*." (Record, p. 11.)

It thus clearly appears that plaintiffs do not claim the title exclusively, under any Spanish or Mexican grant. They have title to it, to use their own language, "other- "wise derived."

The proviso to the 6th section of the limitation act above quoted, was enacted in 1855, and intended to aid those whose claims to land were pending before the Board or in the Courts. It was a mere suspension of the general law as to them, until their claims should be finally decided.

But where the party comes into court and avers the land is claimed by him "under title otherwise derived," he places himself clearly without the proviso, nor can it aid his case to say that, he also claims under the governments named.

It follows that the defendants are completely protected by the statute of limitations, and the court erred in rejecting the evidence offered, viz: The grant from the Governor to Castaneda, Arenas and Dias,—and that such

grant was actually executed and delivered on the day of its date, (June 30th, 1846,) and the consideration ($3,000) then paid: and the deraignment of the title from them to Beard, and his entry and occupation under such title.

A. M. CRANE.
Of Counsel for Plaintiffs in Error.

IN THE SUPREME COUR

OF THE UNITED STATES.

E. L. BEARD, ET AL.

[Plaintiffs in Error,

VS.

JULIAN FEDERY

[Defendant in Error.

Points of Defendant in Error.

E. CASSERLY, FOR DEFENDANT IN ERROR.

SAN FRANCISCO:
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1865.

SUPREME COURT

OF THE UNITED STATES.

E. L. BEARD, ET AL.,
[Plaintiffs in Error.
vs.
JULIAN FEDERY,
[Defendant in Error.

ERROR FROM CIRCUIT COURT, NORTHERN DISTRICT CALIFORNIA.

The action was in Ejectment by *Federy* v. *Beard*, et al., the former claiming under a U. S. Patent to J. S. Alemany, Bishop, &c., for the garden and orchard of the Mission of San Jose; being about $19\frac{19}{100}$ acres.

Trial before Field and Hoffman, J. J.

Judgment for Plaintiff Federy (Defendant in Error).

POINTS OF DEFENDANT IN ERROR.

I.—*First Exception:* As to the character of the decree of the District Court entered upon dismissal of the Appeal; as set forth upon the face of the Patent.

Bill of Exceptions, p. (original) 46.

The objection to the admission of the Patent upon this ground was not well taken.

1. The decree of the District Court was according to the form usually, if not universally, adopted upon the dismissal of an "appeal" in the District Court by the Attorney General; as may be seen by reference to the many Patents issued in such cases.

If this Patent is held void upon this ground, probably the majority of the patents issued for lands in California must fall with it, and for the same reason.

2. Moreover, the decree is entirely right. The transfer of the case from the Board of Land Commissioners into the District Court, though called an "appeal," is in truth a new suit—an original proceeding—in that Court.

U. States v. *Ritchie* 17 How. 533–4.

Upon the dismissal of the suit in the District Court, the decree of the Board below took effect, as of course, precisely as though no "appeal" had ever been taken; leaving the claimant at liberty to proceed upon the decree of the Board as upon a final decree. It is, certainly, no objection to the decree or order of dismissal in the District Court, that it declared in terms the effect, which, without those terms, the law would have given to the dismissal.

It will not, of course, be denied that the Attorney General had authority to dismiss the suit in the District Court.

II.—*Second Exception:* This is substantially the same with the First Exception, and is disposed of in the same manner.

Bill of Exceptions, p. (original) 47.

III.—*Third Exception:* That the Petition of the Claimant, Joseph S. Alemany, Bishop, &c., presented to the Board of Land Commissioners for the confirmation of the premises in question, and for which the Patent issued—shows a want of jurisdiction in the Board, under the Act of Congress, in this: that the Petition does not set forth any claim to the premises by virtue of any right or title derived from the Spanish or Mexican Government.

Bill of Exceptions, pp. (orig.) 47, 48, &c., to 56.

This Exception appears to be upon the ground that the title to the premises in question, being Church lands, as set forth in the Petition, did not purport to rest in, or be evidenced by, any written grant or concession from the Spanish or Mexican authorities.

This ground is not well taken.

The Petition sets forth and relies on two sources of title, either of which would have been sufficient, while both together are more than sufficient, to sustain the jurisdiction of the Board.

1. The Petition avers, that by the laws of Spain, from time immemorial, and by the laws of the Republic of Mexico at the time of the cession of California to the United States, the Canon law of the Roman Catholic Church had the force of law in all things relating to the acquisition, transmission, use and disposal of property, real or personal, belonging to the Catholic Church, or devoted to religious purposes or uses, or to the service of God; and that by the same laws, it was not necessary that any grant of land for ecclesiastical or Church purposes should be evidenced by any deed or writing, public or private; but the right of the Church to the property devoted to religious purposes, &c., was always recognized as regulated by the Canon law. (Bill of Exceptions, p. 49.) That the premises in question, being the Church lands at the Mission of San Jose, consisting of the church, church yard, burial ground, parsonage, orchard and vineyard, with the necessary buildings and appurtenances, (embracing in the whole not more than about $19\frac{19}{100}$ acres of land, and being entirely distinct from and far inferior in extent and value to the Mission lands or rancho of the same Mission,) had been for a long period of time, devoted to religious purposes and uses, the public worship of God, the administration of the sacraments and sacrifice of the Church; according to the rites, ritual and ceremonial, of the said Catholic Church. (Bill of Exceptions, 49–50.) That by the Canon law, and the laws of Spain and Mexico, the title, control and administration of this and all other Church property of the same description, absolutely essential to the religious

uses and purposes above mentioned, (the vineyards and olive gardens being not less necessary, for the wine and the oil they produced, to the sacrifice of the Mass and the Sacraments of the Church, than the Church edifices and the parsonage houses themselves,) was vested in the Bishop and Clergy of the Diocese, who for such purposes were regarded as a body corporate. (Bill of Exceptions, 50.)

a. These averments in the Petition, and the others found in the same connection, do distinctly give jurisdiction to the Board of Land Commissioners. For they show a "claim by virtue of a right or "title derived from the Spanish or Mexican Gov- "ernment;" which is all the Act requires.

Act of Congress, § 8 (Brightly Dig. 112 § 41.)

b. Nowhere does the Act restrict in any other respect, the character of the "right or title" under which the claim is made. Enough, that it is a "right or title derived from the Spanish or Mexi- "can Government." Still less does it purport to establish any statute of frauds, as to the peculiar mode or form of the proof of such "right or title." It would have been remarkable if it had; in view of well-known facts as to the system of land tenures in California under the Spanish and Mexican Governments, and especially the tenure of Church lands, churches, graveyards, parsonages, gardens, &c.; which, like similar property held by titles dating back to the Canon law of Catholic times in England, and by analogous tenures in some of the States of the Union, were held by the Bishops or

Clergy of the Catholic Church, by titles resting in the law of the land, rather than in parchment or paper evidences of grants.

The general principle is fully recognized in recent cases by this Court.

U. States v. *Wilson* 1 Black 267, 268–9, 269–70. See, also,
U. States v. *Chavoya* 2 Black 593, 595, 598.

2. Another element of title distinctly relied on in the Petition, is the actual and undisputed possession had by the Church of the lands claimed. (Bill of Exceptions, 52.)

This possession, in the case of the premises in question, the Petition shows, dated back to about 1797, the year of the establishment of the Mission. (Bill of Exceptions, 54, No. 10.)

The equity of a sufficient possession of land in California under the Spanish or Mexican Authorities, is a competent ground for the confirmation of a claim in the absence of a written title.

U. States v. *Chavoya* 2 Black 593, 595, 598.

3. As the Petition averred very distinctly a union of both those elements of title in the Claimant, it set forth a "claim" abundantly valid, entitled to confirmation, and, of course, sufficient to give jurisdiction to the Board of Land Commissioners.

And so the Court below rightly held. (Bill of Exceptions, 56.)

IV.—*Fourth and Fifth Exceptions:* These two Exceptions, save, in so far as they are a repetition of the Third Exception, go to the decision of the Court overruling an offer of Plaintiffs in Error to show, by the "Record "of the Land Commissioners and the evidence "therein contained, affirmatively," "that the "Claimant had no right whatever to the or- "chard and vineyard, or either of them, by "virtue of any right or title derived from the "Spanish or Mexican Government;" and that "the entire right" on which the Board confirmed the claim, "was based exclusively up- "on verbal testimony tending to show that "the Missionaries, or Priests, had for many "years possessed and occupied the premises, "and that the former Governments of Spain "and Mexico had respected and protected "such possession."

Bill of Exceptions, 56, 57.

This offer was objected to by the Counsel of the Defendant in Error, and rejected by the Court below on the ground that it was incompetent and inadmissible thus collaterally to impeach the decree of the Land Commissioners.

Bill of Exceptions. 57.

The correctness of this decision is entirely beyond question. The Petition just previously exhibited to the Court, set forth a good and valid "claim under a right or title derived from the

"Spanish or Mexican Government," within the Act of Congress; and therefore contained every requisite necessary to give jurisdiction to the Board. In other words, it averred sufficiently in pleading the essential jurisdictional facts. The very case, therefore, was presented, in which upon evidence to be heard, the Board, as a judicial body, had the authority to reject or confirm the claim. Having heard evidence, then, in the exercise of its authority, that is, of its jurisdiction, it rendered its decree confirming the claim.

Such a decree, whether the Board be deemed a limited, or even an inferior tribunal, can never be assailed collaterally on the alleged ground that it was against evidence.

The rule is settled in this, as in every other Court of established authority, that whenever, even in the case of the judgment of an inferior Court, the jurisdiction over the subject matter, appears upon the face of the proceedings, the errors or mistakes of the Court, if any, in the judgment, cannot be questioned collaterally.

Thompson v. *Tolmie* 2 Pet. 157, 168–9.

Grignon's Lessee v. *Astor* 2 How. 319, 338, 340–1, 342.

Voorhies v. *Bank of U. States* 10 Pet. 449, 473, 474.

Sheldon v. *Wright* 1 Seld. 497, 512, 514.

Mather v. *Hood* 8 Johns. *45, 49, 50, 51.

Wesson v. *Chamberlain* 3 Comst. 331, 332.

Cunningham v. *Bucklin* 8 Cowen *178, 186.

Britton v. *Kinnaird* 1 Brod. & Bing. 432 (5 Eng. Com. Law.) "The Bumboat Case."

Regina v. *Bolton* 1 Ad. & Ell. N. S. *66, 71, 71 to 76.

Ashcroft v. *Bourne* 3 Barn. & Ad. 684, 687 to 690.

Aldridge v. *Haines* 2 Barn. & Ad. 398, 409.

V.—*Sixth Exception:* This Exception, arising out of the offer of the Plaintiffs in Error (Defendants below) to prove an alleged title in themselves to the premises in controversy, was not well taken on any ground.

1. The alleged grant was never submitted for confirmation to the Board of Land Commissioners; and was wholly unconfirmed. (Bill of Exceptions, 58.)

Such a claim furnishes no defence in an action upon a Patent.

Singleton v. *Touchard* 1 Black 342, 344 345.

Greer v. *Mezes* 24 How. 268, 274, 275–6.

Estrada v. *Murphy* 19 Cal. 268, 269, and cases cited; 270, 271, 272.

Rico v. *Spence* 21 Cal. 511.

2. The alleged grant is not found among the archives of the Mexican Government in California, nor any copy or counterpart thereof; nor any

record of the same, or paper relating thereto.
Bill of Exceptions, 58.

The title offered in proof was, therefore, an invalid title.

Luco v. *U. States* 23 How. 515, 543.
Palmer v. *U. States* 24 How. 125, 128.
U. States v. *Castro* 24 How. 346, 349–50, 350, 350–1, 351.

3. Upon the two grounds just stated, the proof offered was objected to in the Court below, and there properly excluded.

VI.—No error appears in any of the Exceptions set forth in the Bill of Exceptions. The judgment below should be affirmed with costs.

E. CASSERLY,
For Defendant in Error.